

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

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In Re: RIVERFRONT MEATS, INC., I&G Docket No. 77. Decided March 29, 1984.

Federal meat grading and acceptance withdrawn—Consent.

Marshall Marcus, for complainant.

Gloria S. Haffer, Cincinnati, Ohio, for respondent.

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*) and applicable rules and regulations to withdraw and deny the benefits of Federal Meat Grading and Acceptance Services from Riverfront Meats, Inc. This processing was commenced by a complaint filed on August 31, 1983, by the Agricultural Marketing Service, United States Department of Agriculture, which is responsible for the administration of the Federal Meat Grading and Acceptance Services. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of the Consent Decision only, Respondent, Riverfront Meats, Inc., admits all of the jurisdictional allegations set forth herein, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. This Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not otherwise constitute an admission or denial by Riverfront Meats, Inc., that it has violated the regulations or statutes involved.

FINDINGS OF FACT

1. Riverfront Meats, Inc. ("Respondent"), is, and at all times material herein was, a corporation which operates a meat processing establishment at 317 Philadelphia St., Covington, Kentucky 41011.

2. At all times material herein, Respondent has requested and received federal meat grading and acceptance services at its place of business in Covington, Kentucky.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

1. Federal Meat Grading and Acceptance Services provided under the Act and regulations are, for a period of 6 months, withdrawn from and denied to Respondent, its officers, directors, partners, affiliates, successors, and assigns, directly or through any corporate or other device. This withdrawal and denial will be effective for a period of 8 weeks to commence on April 1, 1984. The remainder of the 6 month period will be held in abeyance and will not become effective:

(a) For so long as, within 6 months of the effective date of this Order, Respondent or any of its officers, partners, employees, agents or affiliates do not violate (as that term is defined in paragraph II, *infra*) any section of the Agricultural Marketing Act of 1946, of amended, or rules and regulations promulgated thereunder.

2. The term violate, as used in paragraph I(a) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of this Order, the suspension of the withdrawal and denial of inspection service under the Agricultural Marketing Act shall be terminated and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

3. The Respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

In Re: MOUNTAINSIDE BUTTER AND EGG COMPANY. I&G Docket No. 64. Decided March 8, 1984.

Gregory Cooper, for complainant.
Samuel Reeken, West Orange, NJ, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The Stay Order filed in this proceeding pending the outcome of proceedings for judicial review is hereby removed. The Order previously filed on August 19, 1980, shall become effective on March 25, 1984.

In Re: PANDOL BROTHERS INC., and PANDOL & SONS. AMA Docket No. F&V 910-5. Decided March 12, 1984.

DISMISSAL

Mr. John McDaniel, for complainant.
Gregory Cooper, Fresno, California, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

IT IS HEREBY STIPULATED between Petitioners, PANDOL BROTHERS, INC. and PANDOL & SONS, and Respondent, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, through their respective attorneys, as follows:

1. That the Petition herein be dismissed with prejudice as to the handling of lemons by Petitioners, or either of them, during certain weeks in 1981 and 1982, as said weeks are more particularly described in the Petition herein. This Dismissal shall be conclusive as to the legality and validity of Marketing Order No. 910 and regulations issued pursuant thereto, as the same applies to the handling of lemons during such weeks.

2. This Dismissal shall not operate to preclude any challenge by Petitioners, or either of them, to the legality or validity of Marketing Order No. 910 or regulations issued pursuant thereto, with respect to the handling of lemons at any time other than those weeks during 1981 and 1982 described in the Petition herein.

In Re: JOHN J. HESS, II. AQ Docket No. 29. Decided March 8, 1984.

Interstate movement of poultry table eggs—Consent.

Kris Ikijeri, for complainant.

John J. Hess, Paradise Pennsylvania, for respondent.

Decision by William Weber, Presiding Officer.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that John J. Hess, II, respondent, violated the act and regulations promulgated thereunder (9 CFR § 81.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waivers:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. John J. Hess, II, respondent, is an individual whose mailing address is, Hess Mills, South Vintage Road, Paradise, Pennsylvania 17562.

2. On or about December 1, 1983, the respondent moved interstate from Lancaster County, Pennsylvania, to Farmingdale, New Jersey, approximately 253,800 poultry table eggs.

3. On or about December 2, 1983, the respondent moved interstate from Lancaster County, Pennsylvania, to Farmingdale, New Jersey, approximately 248,400 poultry table eggs.

4. On or about December 5, 1983, the respondent moved interstate from Lancaster County, Pennsylvania, to Farmingdale, New Jersey, approximately 474,480 poultry table eggs.

5. On or about December 7, 1983, the respondent moved interstate from Lancaster County, Pennsylvania, to Farmingdale, New Jersey, approximately 216,000 poultry table eggs.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order, in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three thousand dollars (\$3,000). The respondent shall send a certified check or money order for \$3,000 payable to the "Treasurer of the United States", to Kris H. Ikejiri, Office of the General Counsel, Rm. 2422-So. Bldg., United States Department of Agriculture, Washington, D.C. 20250, within (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In Re: STEVE HAMLIN. AQ Docket No. 30. Decided March 12, 1984.

Interstate movement of cows.

Thomas Bundy, for complainant
Respondent, *pro se*

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Steve Hamlin, herein referred to as the respondent, is an individual whose address is Box 474 Wellington, Kansas 67152.

2. On or about April 28, 1983, the respondent moved interstate 19 cows from Omaha, Nebraska, to Winfield, Kansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two thousand dollars (\$2000) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Thomas E. Bundy, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In Re: EVANGELOS P. HALARIS. AQ Docket No. 21. Decided March 13, 1984.

Interstate movement of pet birds—Consent

Kevin Thiesmann, for complainant
Respondent, *pro se*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Evangelos P. Halaris, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 92.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Facts set forth below, and waives:

(a) Any further procedures;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Evangelos P. Halaris, respondent, is an individual whose mailing address is 2620 Garfield Street, Washington, D. C. 20008.

2. On or about August 31, 1983, the respondent brought nine (9) pet birds into the United States from Athens, Greece.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the remaining allegations in this complaint and having agreed to the

provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of eight hundred dollars (\$800.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 S. Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In Re: CLAUDE GILMER and TRI-COUNTY RODEO INC. AQ Docket No. 32. Decided March 21, 1984.

Movement of equine infectious anemia reactor horses; movement of bulls within a Class B area—Consent.

Thomas Bundy, for complainant.

Jack Wallach, Anniston, Alabama, for respondent.

Decision by John Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clyde Gilmer and Tri-County Rodeo, Inc., respondents, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.* and 9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents specifically admit that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that the United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. Clyde Gilmer, respondent, is an individual whose mailing address is Route 1, Box 524, Ohatchee, Alabama 36271.

2. Tri-Country Rodeo, Inc., respondent, is a corporation whose mailing address is Route 1, Box 524, Ohatchee, Alabama 36271.

3. On or about June 16, 1983, the respondents caused the interstate movement of four (4) equine infectious anemia reactor horses from Ohatchee, Alabama, to Douglasville, Georgia.

4. On or about June 16, 1983, the respondents caused the interstate movement of ten (10) bulls from Ohatchee, Alabama, within a Class B area, to Douglasville, Georgia.

5. On or about June 19, 1983, the respondents caused the interstate movement of four (4) equine infectious anemia reactor horses from Douglasville, Georgia to Ohatchee, Alabama.

6. On or about June 19, 1983, the respondents caused the interstate movement of ten (10) bulls from Douglasville, Georgia, within a Class B area, to Ohatchee, Alabama.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

Each respondent is assessed a civil penalty of two thousand dollars (\$2,000.00) which shall be payable in the following manner. Each respondent shall make an initial payment by sending a certified check or money order for one thousand two hundred fifty dollars (\$1,250.00), payable to the "Treasurer of the United States" and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Depart-

ment of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order. Each respondent shall send a second and final payment of seven hundred fifty dollars (\$750.00), payable in the above manner, within one hundred twenty (120) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In Re: J. L. ESICK. AQ Docket No. 7. Decided April 3, 1984.

Interstate movement of cattle—Consent.

Michael Werner, for complainant.
Respondent, *pro se*.

Decision by John Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that J. L. Eslick, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. J. L. Eslick, is an individual whose mailing address is 1320 Mill Street, Pulaski, Tennessee 38478.
2. On or about June 7, 1983, the respondent shipped interstate at least 4 cows from Pulaski, Tennessee to Athens, Alabama.
3. On or about June 11, 1983, the respondent shipped interstate at least 10 cows from Pulaski, Tennessee to Athens, Alabama.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars (\$1,000) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Michael T. Werner, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

*In Re: JOHN WELLS and BOB MOORE a/k/a MONTECA RANCH, and
JOHN WELLS, an individual. AQ Docket No. 23. Decided April 9,
1984.*

Interstate movement of cattle—Consent.

Thomas Bundy, for complainant.
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondents, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*) The parties have agreed that this proceeding should be terminated by

entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Finding of Facts set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. a. John Wells, herein referred to as the respondent, is an individual whose address is Rt. 4, Box 241, Old Stage Rd. Porterville, California 93257.

b. Bob Moore is an individual whose address is 1314 Hardrock Rd., Irving, Texas 75061.

c. John Wells and Bob Moore are partners doing business as Manteca Ranch, herein referred to as the respondent, whose address is Route 1, Era, Texas 76238.

2. On or about June 7, 1983, respondents moved interstate two cows from Calhan, Colorado, to Era, Texas.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondents are each assessed a civil penalty of two hundred dollars (\$200) which shall be payable to the, "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Thomas E. Bundy, Office of the General Counsel,

Room 2422 So. Bldg., United States Department of Agriculture, Washington, D.C. 20250, within (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondents.

In Re: DELL HALL and STEVEN W. ULLOM D.M.V. AQ Docket No. 24. Decided April 11, 1984.

Interstate movement of 10 cows—Consent.

Kris Ikejiri, for complainant.

Respondent, *pro se*.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111, § 120, and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) Respondent Steven W. Ullom, D.V.M. and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Steven W. Ullom admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Steven W. Ullom, also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Steven W. Ullom, respondent, is an individual who is now, and at all times material herein was, a Doctor of Veterinary Medicine, and an accredited veterinarian in the state of Oklahoma, and whose mailing address is Route 1, Box 112E, Tahlequah, Oklahoma 74464.

2. On or about April 21, 1983, respondent Steven W. Ullom caused the interstate movement from Hulbert, Oklahoma to Cody, Wyoming, of 10 cattle.

CONCLUSIONS

Respondent Steven W. Ullom, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars (\$300) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within 30 days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In Re: DAVID STIENBECKER and DANNY COBB. AQ Docket No. 39. Decided April 18, 1984.

Interstate movement of 9 cows—Consent.

Michael T. Werner, for complainant.

Respondent, *Danny Cobb, pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that David Stienbecker and David Cobb, respondents, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this pro-

ceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Cobb admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Cobb also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Danny Cobb, is an individual whose mailing address is P.O. Box 37, Maury City, Tennessee 38050.

2. On or about March 24, 1983, the respondent, Danny Cobb, was responsible for the movement of at least 9 cows interstate from Maury City, Tennessee to Perryville, Missouri.

CONCLUSIONS

The respondent, Danny Cobb, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent, Danny Cobb, is assessed a civil penalty of one thousand dollars (\$1,000) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Michael T. Werner, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

*In Re: SMART'S DAIRY, RALPH SMART, and GARRY SMART. AQ
Docket No. 17. Decided April 23, 1984.*

Interstate movement of 1 cow—Consent.

Kris Ikejiri, for complainant.

David Adams, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111, § 120, and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. Smart's Dairy, respondent, is a partnership whose mailing address is Route 5, Box 164, Holly Springs, Mississippi 38635.

2. Ralph Smart, respondent, is an individual and a partner in Smart's Dairy, whose mailing address is Route 5, Box 164, Holly Springs, Mississippi 38635.

3. Garry Smart, respondent, is an individual and a partner in Smart's Dairy, whose mailing address is Route 5, Box 164, Holly Springs, Mississippi 38635.

4. On or about August 1, 1983, the respondents caused the interstate movement from Holly Springs, Mississippi to Collierville, Tennessee, of one (1) cow.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

Each respondents is assessed a civil penalty of three hundred dollars (\$300). Each respondent shall send, payable to the "Treasurer of the United States," a certified check or money order, and shall forward the certified check or money order to Kris H. Ikejiri, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within 30 days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondents.

In Re: SEA-LAND SERVICE INC. AQ Docket No. 44. Decided April 23, 1984.

Imported camel to Puerto Rico—Consent.

Kevin Thiesmann, for complainant.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111, § 120 and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Sea-Land Service, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 92.1 *et seq.*). The parties have agreed that this proceeding should

be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision, and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Sea-Land Service, Inc., respondent, is a corporation whose mailing address is G.P.O. Box 2648, San Juan, Puerto Rico 00936.

2. On or about August 30, 1983, the respondent imported into Puerto Rico one (1) camel.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In Re: DR. DONALD F. HODGSON. VA Docket No. 26. Decided April 13, 1984.

Veterinary accreditation suspended—Consent.

Sally Loran, for complainant.

Cary Standiford, Topeka, Kansas, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), hereinafter referred to as the regulations, by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the standards for Accredited Veterinarians (9 CFR § 161.2). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (9 CFR § 162.1 and 7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dr. Donald F. Hodgson, hereinafter referred to as the respondent, is an individual whose mailing address is Box 61, Wetmore, Kansas 66550.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Kansas, under the provisions of the regulations.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent's veterinary accreditation is hereby suspended for twelve (12) months.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the day this order is signed by the administrative law judge.

*In Re: JUDY GRAY, DICK W. PIRKEY, and SHARON DOGA. AWA
Docket No. 227. Decided March 1, 1984.*

Raising, buying, selling, and transporting animals without a license—Consent.

*Gregory Cooper, for complainant.
Respondent, pro se.*

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act. It was instituted by a complaint filed on January 27, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service, pursuant to the Act and the applicable Rules of Practice (7 CFR § 1.133(b)(1)). This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

Respondent Dick W. Pirkey specifically admits the jurisdictional allegations of the complaint, but neither admits nor denies the remaining allegations of the complaint. Respondent Dick W. Pirkey waives the right to a hearing and any further procedures in this matter. Respondent Dick W. Pirkey and the complainant consent to the issuance of this decision for the purpose of settling this proceeding.

FINDINGS OF FACT

1. Dick W. Pirkey, hereinafter referred to as the respondent, is an individual whose address is R.R. 2, Box 311, DeKalb, Texas 75559.
2. Respondent Dick W. Pirkey, at all times material herein, was engaged in business as a dealer within the meaning of section 2 of the Act (7 U.S.C. § 2132) raising, buying, transporting and selling dogs in commerce.
3. Since August 21, 1981, respondent Dick W. Pirkey has not been licensed in any capacity under the Act.

CONCLUSIONS

Inasmuch as the respondent Dick W. Pirkey has admitted the jurisdictional allegations of the complaint and the respondent Dick W. Pirkey and the complainant have agreed to the provisions set forth in the following Order in disposition of this proceeding against Dick W. Pirkey, such Order will be issued.

ORDER

Respondent Dick W. Pirkey, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from failing to comply with the requirements of the Act and the regulations and standards thereunder including, but not limited to, the requirements of the Act and the regulations concerning the raising, buying, selling and transporting of animals without a license.

Respondent Dick W. Pirkey is assessed a civil penalty of \$2,000 which shall be paid by certified check or money order made to the order of the Treasurer of the United States and which shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250, within 30 days from the date that this Order becomes effective.

This decision shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on respondent Dick W. Pirkey.

In Re: CHARLES JOHNSON. AWA Docket No. 245. Decided March 22, 1984.

License as exhibitor revoked—Consent.

Gregory Cooper, for complainant.

Respondent, *pro se*.

Decision by William Weber, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act. It was instituted by a complaint filed on May 5, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service, pursuant to the Act and the applicable Rules of Practice (7 CFR § 1.133(b)(1)). This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

The respondent specifically admits the jurisdictional allegations of the complaint, but neither admits nor denies the remaining allegations of the complaint. The respondent waives the right to a hearing and any further procedures in this matter. The parties

consent to the issuance of this decision for the purpose of settling this proceeding.

FINDINGS OF FACT

1. Charles Johnson, hereinafter referred to as the respondent, is an individual who operated a business as Johnson's Zoo and Animal Farm, whose address is Route 3, Smithfield, North Carolina 27577, until July, 1983. He hasn't operated a zoo since last July, 1983.

2. Respondent at all times material herein was a licensed exhibitor within the meaning of sections 2 and 3 of the Act (7 U.S.C. §§ 2132 and 2133).

CONCLUSIONS

Inasmuch as the respondent has admitted the jurisdictional allegations of the complaint and the parties have agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order will be issued.

ORDER

Respondent's license as an exhibitor under the Act is hereby revoked. (These licenses were returned to USDA in July, 1983.)

Respondent, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from failing to comply with the requirements of the Act and the regulations and standards thereunder including, but limited to, the licensing requirements and the standards under the Act concerning facilities, watering, sanitation, separation, handling, and veterinary care.

This decision shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on the respondent.

In Re: IRMA SPRINKLE. AWA Docket No. 275. Decided April 13, 1984.

Cease and desist wholesale animal business—Consent.

Alexandra Maravel, for complainant.

Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, as amended. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure herein. Complainant and respondent consent to the issuance of this order.

ORDER

Respondent is ordered to cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued pursuant to the Act. Respondent has agreed to cease all sales of animals except retail sales of pets. Respondent may sell her remaining breeding stock to animal dealers to wind up her wholesale animal business as long as she informs APHIS in writing of the intended sale before it occurs. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

In Re: NOEL LEACH d/b/a LEACH KENNELS. AWA Docket No. 225. Decided April 26, 1984.

Violations of Animal Welfare Act as it pertains to the care and treatment of animals to be used for animal research—Decision.

Complainant as a member of a humane society organization and several colleagues brought this action against respondent claiming various violations of the AWA in its care and transport of animals. Respondent was able to rebutt these claims and was found liable for only one violation which was "having cages without first removing the animal."

Donald Tracy, for complainant.

John Carter, Danville, Virginia, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This disciplinary proceeding arises by reason of a Complaint, filed January 27, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, wherein it is alleged that Respondent violated numerous regulations and standards issued pursuant to the Animal Welfare Act, as amended, (7 U.S.C. § 2131, *et seq.*). The Complainant requests a suspension of Respondent's License No. 52 BA for thirty days and thereafter until Respondent demonstrates that his facility fully complies with all applicable regulations and standards under the Act, as well as a cease and desist order and the assessment of a civil penalty of \$750, against the Respondent.

The Respondent filed an Answer on March 4, 1983, denying that it violated the Act, the regulations and standards, and, among other things, it was asserted that, " * * * it is denied that the alleged violations * * * took place and and/or that these officials of the Department of Agriculture came about their accusations by virtue of their own observations but rather by way of complaints made by the West Piedmont Humane Society * * * ." Respondent also alleged affirmative allegations of fact in response to those alleged in the Complaint. Further, paragraph 8 of the Answer asserts:

"That it would appear that the complaints of the West Piedmont Humane Society are the result of perhaps well-meaning but over zealous animal lovers, who philosophical-ly object to the use of the lower order of primates for medical research. The problem is that of balancing compassion for animals against the benefits to humanity gained from the use of animals in medical research and the development of surgical techniques. While there is no way of calculating the untold benefits to humanity, the lives saved, and the suffering alleviated, by experimentation performed upon animals by the medical professions, the question of whether this research should be performed upon animals or upon human beings is hardly a issue to be addressed to the administrative branch of the government. Congress has approved the use of animals for medical research as in the best interest of humanity. If the humane societies are in disagreement and feel that animals should not be used to

further medical science, then their approach should be to the Congress and not the harassment of those licensed by the Department of Agriculture to supply animals to the medical profession for research."

Pursuant to due notice therefor, the oral hearing took place on June 29, 1983, in Danville, Virginia, before Administrative Law Judge Dorothea A. Baker. The Complainant was represented by Donald A. Tracy, Esquire, United States Department of Agriculture, and the Respondent was represented by John W. Carter, Esquire, 410 Patton Street, Suite B, Danville, Virginia. In due course, the parties filed briefs, the last brief having been filed December 1, 1983.

Both the Complainant and the Respondent introduced evidence relative to the ethical, moral and appropriateness of using animals for medical research. I am not in a position in this proceeding to arrive at any all encompassing conclusions with respect to the use of animals for medical research nor shall I attempt to do so. This is a task for the legislature. Judges are not empowered to decree what the law should be, but rather they must decide what the law is, and apply it. Obviously, those who are opposed to the use of animals for such purposes have many worthy arguments and those in favor of using animals for medical research also do so on a premise that it ultimately results in a benefit to humanity. I do not know whether the use of animals for medical research is necessary or unnecessary nor do I believe that such issue can be decided on the evidence presented by both sides in this case.

If I had my way and if it were within my power, which it is not, nor do I believe it to be in the power of any human being, I would preclude any and all cruelty and pain and suffering to both animals and human beings. However, this is a goal of humanity which has not yet been achieved in the many eons of its existence.¹

The sole issue to be decided here is not the propriety of using animals for medical research but, rather, did the Respondent violate the Animal Welfare Act and the regulations issued thereunder.

¹ As an individual, I have had occasion to be around and/or to care for dogs, cats, rabbits, cows, goats, sheep, ducks, chickens, horses, and other animals. Such animals were well cared for and humanely treated, and were not used for laboratory purposes. However, this personal approach cannot abrogate the requirements of due process to which this Respondent is entitled, namely, whether or not his actions violated a law which was duly considered and passed by Congress. That law permits the use of animals for medical research. If this is to be changed, it must be done through legislative channels.

Complainant has the burden of proof of showing by persuasive, credible evidence that on May 28, 1982, the regulations and standards were violated as follows:

(a) Many of the dogs and cats did not have tags as required by 9 CFR 2.50.

(b) The primary enclosures containing the dogs and cats were not cleaned of excreta as required by 9 CFR 3.7(a) and 3.12(e).

(c) The interior of the animal cargo space had a sickening odor of urine and feces from not being kept sufficiently clean in violation of 9 CFR 3.13(e).

(d) There were numerous violations of 9 CFR 3.12(c) which requires that primary enclosures used to transport live dogs and cats should be large enough to ensure sufficient space for each animal to turn about freely using normal body movements to stand, sit erect, and lie in a natural position. The dog cages were approximately 32 inches deep by 70 inches wide, by 26 inches high. One such cage had seven large dogs in it. Several other[s] had five medium or larger dogs. The cats were in cages 24 inches deep by 36 inches wide, by 12 inches high. Two cages had seven cats each and one had eight cats.

(e) Some of the animals were not housed in compatible groups as evidenced by fighting that was occurring. This violates 9 CFR 3.9.

(f) Some of the primary enclosures did not contain clean litter as required by 9 CFR 3.12(c).

The allegations of the Complaint base the alleged violations for which sanction is sought upon the *belief* of two United States Department of Agriculture Governmental Officials that Respondent violated the regulations and standards.

APPLICABLE REGULATIONS

9 CFR 2.50

(b) Except as otherwise provided in this section, when a Class B dealer or exhibitor purchases or otherwise acquires a dog or cat, affecting commerce, he shall immediately affix to such animal's neck an official tag of the type described in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats.

* * * * *

Said Regulation also sets forth:

In general, well fitted collars made of leather or plastic will be acceptable under this provision. The use of certain types of chains

presently used by some dealers may also be deemed acceptable. A determination of the acceptability of a material proposed for usage as collars from the standpoint of humane considerations will be made by Veterinary Services on an individual basis in consultation with the dealer or exhibitor involved. The use of materials such as wire or elastic that might readily cause discomfort or injury to dogs or cats will not be acceptable.

The time when the tagging must be done under the circumstances set forth therein is stated to be "*** at the time it is delivered for transportation, transported, or sold.***"

9 CFR 3.7(a)

(a) *Cleaning of primary enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the dogs or cats contained therein and to reduce disease hazards and odors. When a hosing or flushing method is used for cleaning a primary enclosure commonly known as a cage, any dog contained therein shall be removed from such enclosure during the cleaning process, and adequate measures shall be taken to protect the animals in other such enclosures from being contaminated with water and other wastes.

9 CFR 3.12(e)

(e) Primary enclosures used to transport live dogs and cats as provided in this section shall have solid bottoms to prevent leakage in shipment and shall be cleaned and sanitized in a manner prescribed in § 3.7 of the standards, if previously used. Such primary enclosures shall contain clean litter of a suitable absorbent material, which is safe and nontoxic to the dogs and cats, in sufficient quantity [sic] to absorb [sic] and cover excreta, unless the dogs or cats are on wire or on other non-solid floors.

9 CFR 3.13(e)

(e) The interior of the animal cargo space shall be kept clean.

9 CFR 3.12(c)

(c) Primary enclosures used to transport live dogs and cats shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely in a standing position using normal body movements, to stand and sit erect, and to lie in a natural position.

9 CFR 3.9 Classification and Separation.

"Animals housed in the same primary enclosure shall be maintained in compatible groups, with the following additional restrictions: ***"

FINDINGS OF FACT

As stated hereinabove, the Findings of Fact herein are premised upon the *evidence adduced in this proceeding*. The weight and evaluation to be given testimony and documentary matters of record require resort to the rules of evidence. Complainant and Respondent agree that Findings of Fact, *infra*, numbers 1 through 6, are correct.

1. Respondent Noel Leach is an individual whose business address is Chase City, Virginia.

2. At all times material herein Respondent held a Class B license (No. 52 BA) issued under the Act.

3. At the time of his most recent license approval, April 19, 1982, Respondent received a copy of the Regulations and Standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed in writing to comply with said regulations and standards.

4. On or about May 28, 1982, Respondent sent two of his employees, James Hayes and John Queensbury, to pick up animals in Respondent's truck as part of Respondent's business.

5. During this trip, which occurred on May 27, and 28, 1982, Respondent's employees picked up approximately 65 dogs and 67 cats.

6. The Complaint ² herein was instigated, premised upon the actions, observations, and interpretations of the applicable Regulations and Standards by two well-intentioned, highly motivated, conscientious individuals: Mr. Larry Herman who is President of the Western Piedmont Humane Society which is affiliated with the North Carolina Humane Federation; and, Mr. Charles Carey, who in addition to his usual employment, is an investigator with the Western Piedmont Humane Society. Both Mr. Carey and Mr. Herman are to be commended for their interest in the prevention of cruelty to animals and for the amount of their voluntary time which they give to the humane societies, which they have done over a long number of years. This is a most worthy activity and one which benefits both animals and society in general.

7. Mr. Carey's work in his investigatory capacity has centered upon matters pertaining to cruelty to animals as compared to investigations involving the transportation of animals. (Tr. 54,55).

² There is presently pending before the Supreme Court of the United States the case of *United States vs. Stauffer Chemical Co.*, No. 82-1448, wherein the issue is presented as to whether or not the Environmental Protection Agency may use private Contractors to conduct air pollution emission tests on private property. Although Mr. Herman and Mr. Carey were not private contractors, nevertheless, they were not employees of the United States Government.

This proceeding was the only time that Mr. Carey had made an investigation into transportation facilities. (Tr. 55)

Mr. Herman indicated that the extent of his participation in this investigation was to stand at the rear of the truck and write down what Mr. Carey told him although he was able to make several observations as are more fully set forth hereinafter.

8. A principal witness appearing on behalf of the Complainant was Compliance Officer Rippy of the U.S. Department of Agriculture who is stationed at Raleigh, North Carolina and who is regarded by the Complainant as an expert. On May 28, 1982, upon being made a party to a telephone conversation between Dr. Rice who was the Area Veterinarian in Charge for veterinary services in North Carolina, Mr. Carey related what he had seen.

Mr. Rippy testified:

*" *** I advised him that I could not possibly get there and do an inspection; if he wished to submit the information he needed to document it in as much detail as possible, and if possible photograph the conditions he was documenting.*

Q: Why did you give him this advice?

A: This is what I would have done if I had been there."
(Tr. 77)

9. Mr. Rippy was not at the area of the alleged violations. He did not observe the truck nor the contents thereof and he only knew what he had been told by Mr. Herman and Mr. Carey. The opinion formed by him, which opinion resulted in a recommendation that a Complaint be instituted, was based upon the aforesaid conversations and the documentation which are a part of the record herein.

10. Included in the evidence is the Deposition taken July 15 1983, in Richmond, of Russell M. Ginn.^{2a} now retired, but the former Compliance Officer, who had had long and extensive experience over a period of 13 years, in investigating complaints of alleged or apparent violations, including complaints concerning the transportation of various animals; and inspection of licensed animal welfare dealers. Of all the witnesses, he was the one who was knowledgeable of Respondent and his facilities. His acquaint-

^{2a} Mr. Ginn is referred to as such in his Deposition and in the briefs of both party litigants. However, it appears his name may be more properly spelled "Gynn"—See Exhibit 4. For convenience of reference and understanding, Mr. Ginn will be used unless otherwise noted.

ance therewith had developed over a period of eight or nine years when he was the assigned inspector of Leach Kennels.

11. As Complainant is aware, the alleged violations by "Respondent" were those of his employees. The evidence indicates that Mr. Leach had instructed his employees to properly care for the animals and that:

"All our trucks are constructed to haul live dogs or cats, and always are cleaned and disinfected before a trip commences. Each time a vehicle is dispatched from the kennels on an animal pick-up it has a supply of food and water on board. Personnel are instructed to comply with government requirements in respect to identification, handling, observation, feeding, waterings, etc." (Ex. 4).

12. Mr. Herman and Mr. Carey conducted an investigation of Respondent's truck on May 28, 1982, at the Catawba County Animal Shelter commencing at approximately 9:45 a.m. As a result of that investigation they made photographs of several of the cages contained in the truck, which photographs comprise evidence herein. The testimony of these witnesses, and that of Mr. Rippy (*who based his conclusions on what was told him as well as observations made from the photos*) reflected like conclusions on the part of these individuals.

13. Mr. Carey's ³ testimony indicates that there was a strong odor in the truck; that the cats and dogs were fighting; that with respect to those animals Mr. Carey could observe, they did not have tags around their necks nor did he observe tags on any of the cages themselves; with respect to the condition of the cages Mr. Carey indicated that there was a build-up of excreta and that although there was some litter in the bottoms of the cages, there did not appear to be enough and that there was excreta that was not covered by litter (a lot of excreta). (Tr. 20). Also included in the testimony of Mr. Carey was the following:

"Q. Now, what was the most number of dogs you saw in any one cage of that approximate size?

A. Seven.

Q. And what size dogs were those?

³ Mr. Carey, a most conscientious investigator, also spoke to a Mr. David Yount, who was referred to as the Chief of Protective Services in Catawba County and Mr. Carey called him to observe Mr. Leach's vehicle and the conditions which were quoted to him. Apparently Mr. Yount was present and did observe the conditions of the truck. Mr. Yount "made no comment." (Tr. 54) And he did not appear as a witness to this proceeding.

- A. They were large dogs. They would weigh anywhere from around 40 to 50 pounds apiece, some of them."
(Tr. 23)

14. With respect to Complainant's Exhibit No. 3, Mr. Carey testified, among other things:

"Q. (By Mr. Tracy) Mr. Carey, how would you characterize the size of the dogs in that photograph?

A. These are large dogs.

Q. Were you able to observe whether the dogs had an opportunity to all lie down or turn around, or move freely in those cages that you were observing?

A. Yes.

Q. And were they able to make those kinds of movements?

A. There were several cages where they could not move around freely." (Tr. 25)

This conclusion that the dogs and cats could not turn around freely in their respective cages was premised upon Mr. Carey's observation of the cages, the animals, and his own determination of how much room would be needed. He did not testify that he saw any animals attempting to move about, turn, stand up and assume normal postural positions which could not do so.

15. Mr. Carey indicated that with respect to the amount of litter in the cages, it varied from cage to cage and that with respect to some cages, he'd say that a third of the bottom was uncovered. He also acknowledged that the milling around of animals could have uncovered some of the area of the bottom of the cages. (Tr. 40)

The standard used by Mr. Carey in arriving at this determination as to the sufficiency of the litter was the following: "Each cage had a solid bottom in it, and it would be expected that the litter would completely cover the bottom. In this case it did not completely cover the bottom,"⁴ (Tr. 39)

16. Mr. Herman assisted Mr. Carey in the investigation which the two of them undertook on May 28, 1982. Mr. Herman's principal function was to take notes on what Mr. Carey had observed. He stood on the outside of the truck. Mr. Herman indicated that he formed certain conclusions as the result of standing on the outside

⁴ The applicable Regulations refer to "sufficient quantity to absorb and cover excreta." It does not mention covering the bottom of cages.

of the truck and looking into it. Among Mr. Herman's conclusions briefly described were those:

"As soon as the door was opened up there was a terrible odor;" (Tr. 64) saw no tags on any cats or dogs; he observed excreta in the bottom of the cages and a few pieces of straw on the bottoms of the cages—he didn't see enough straw to cover anything [everything] in the bottom of the cages as far as excrement. (Tr. 66)

The only way he knew to describe the amount of straw at the bottom of the cages was "two handfuls." (Tr. 69)

17. Upon review of the data made available to him by Mr. Carey and Mr. Herman, Mr. Rippy concluded that seven dogs in a cage measuring 70" x 32" x 26" was violative of the Animal Welfare Act. This conclusion was premised not upon Mr. Rippy's observation of the dogs (except as set forth in the photographs and what was told him) but rather his conclusion was based upon his reading of the Regulations under the Animal Welfare Act. He did not know of his own knowledge that there were seven dogs over 40 pounds in the described cage. With respect to whether or not the dogs and cats had tags Mr. Rippy concluded that they did not because, "In the photographs that they submitted there is no evidence of any of the animals being tagged." (Tr. 85, 86) With respect to the charge that there was insufficient litter, Mr. Rippy's opinion was premised upon: "The Western Piedmont Humane Society's statement that there was not sufficient litter to cover all of the excrement." (Tr. 87)

18. With respect to the cats here involved, Mr. Rippy did not know the nature of such cats and the extent to which, if any, each, or all of them had a dominant personality or a subordinate personality, (Tr. 90) which is a factor in achieving compatibility in the cages. Nor did he know how long each specific cat had been in the particular cage in which it was photographed.

19. Although Mr. Rippy relied upon the photographs as concern some of his conclusions, with respect to the charges of insufficient litter, excrement not being covered and the cages not being cleaned properly, he relied on the statements provided him by Mr. Carey and Mr. Herman. (Tr. 93)

20. Because this proceeding is governed by legal principles, and because the Complainant, the U. S. Department of Agriculture has the burden of proof, the testimony of Mr. Carey and Mr. Herman must be weighed together *with the other evidence of record*.

20. Included in that evidence is the Deposition of Russell M. Ginn which Deposition was taken on behalf of Respondent on July 15, 1983, in the presence of Respondent's counsel and counsel for

the U.S. Department of Agriculture. Mr. Ginn's extensive experience as an investigator and compliance officer have been set forth above. During the course of his official duties, Mr. Ginn became acquainted with the Respondent, Noel Leach, and had known him for a period of approximately eight or nine years during which routine inspections were made of Mr. Leach's kennels. At one time Mr. Ginn conducted monthly inspections but in the last few years he was inspecting them semiannually due to budget limitations.

21. On those inspections, Mr. Ginn had occasion to inspect the Respondent's kennels, vehicles and records. Mr. Ginn found that Mr. Leach was always cooperative and attempted to carry out the instructions and suggestions of Mr. Ginn even though such instructions and directions were not spelled out in the regulations.⁵

22. In his testimony, Mr. Ginn noted with respect to animal confinement that there are two different standards for dogs, i.e., a "kennel standard" and a "transportation standard."

23. As to the number of animals in a cage, Mr. Ginn realized that the Regulations were somewhat ambiguous and accordingly on several occasions he contacted Dr. Schwinderman and discussed the matter with him. It was Mr. Ginn's impression that if the animals could freely stand and sit and lie down that the Department would not insist that there be only one animal per cage.

Mr. Ginn emphasized the high amount of subjectivity that was involved in the performance of his official duties:

"And, once again, I want to point out this is my judgment on this thing, and you have to use a lot of judgment in the field. It is just that simple." (Dep. 12)

24. The testimony of Mr. Ginn, a recognized expert, also included the following:

⁵ Q.: What sort of cooperation did you get from Mr. Leach?

A: I have no complaints at all. Every time I asked Mr. Leach to do something, it was done. And 90 percent of the time it was done in a timely manner, within the time limit that I had specified. And if it wasn't done, there was an acceptable reason it wasn't done." (Dep.14)

"A. Of course, the regulations once again state that fecal matter shall be removed as required. What my instruction was to Leach, and I believe they were carried out, I have no way of saying yes or not they weren't, was that, in my opinion, when you generally go on a two day run, that when you stop for the night, that these cages should be cleaned either that night or on the following morning before you go back on the road again. And, of course, if you are running into a problem, this is a thing you are going to have to do, your driver is just going to have to keep these things clean.

"And you know, with the cleaning of the cages, and that, we probably run into it in a situation where people like us, who have had years of dealing with animals, cattle, horses, swine and everything like that, is we understand from the minute you put animals in a cage, there is going to be fecal matter and urine there, and you can't go around with a little pooper scooper every time and clean those cages out. But then again, people that deal with livestock, they know when things just get too bad and have to be cleaned out." (Dep. 14 and 15)

* * * * *

"Q. Let me ask you what sort of problems do you have with animals that have a tendency to fight, or be domineering, or something of that sort?

"A. I would think, and I think this is a problem particularly true with dogs, and certainly to an extent with cats, much more than the other type of farm animals, when you take a bunch of strange dogs and put them in a pen together, the first thing you are going to get is a pecking, a few snarls, and this and that. And, generally, you find out within a period of five minutes that these animals will settle down. There is one or two of them that will become dominant, and the others will lay down and become subservient.

25. Among the matters mentioned by Mr. Ginn with respect to the tagging requirement, were the following: that records were to be kept from the time that the dogs were picked up until disposal to some medical facility, which called for the attachment of an

identification tag, which has a USDA and a State number code, as well as an individual animal code. Such tagging is to be done when the dealer takes possession of the animals. Dep. 18. Cats sometimes will not tolerate tags around their necks, and there are provisions for the attachment to the cage of the identification. The tags may be affixed by twine, as well as by several other materials. (Dep. 20).

In referring to the identification tags, Mr. Ginn was asked whether such tags would be heavy enough to fall down underneath the dogs' necks on all occasions when the dog is tagged. Mr. Ginn's reply was:

A. No. I have seen many times, and particularly when dogs have winter coats on, I see many times where they would be on the back of their hair. In other words, they are not heavy enough to force gravity to pull them around to the bottom.

Q. Is the same thing true of cats?

A. I would think that if the collar were loose, you know, completely loose, and particularly if it was a twine, or something, eventually it would probably work its way down. *But I have never seen a cage of dogs with a dozen dogs in it where you go down and see them all hanging down there just like a necklace, or something like that.* There always seems to be one or two up around the neck. As a matter of fact, when you go to inspect a dog kennel, many times you have to go right into the individual primary enclosures and check these things yourself, because they are not evident to you from the outside. And this is particularly true in these animals that have winter coats on. (emphasis added)

"Q. When you say primary enclosure, I take it this is when they have been transferred to the holding kennels?

"A. Yes.

"Q. And when you go in to inspect, you have to look around the dog's neck to find the identification?

"A. Yes. If I could clear this up, when we use the term primary enclosure, this is the individual, or the thing that encloses a dog. If we had a dog cage sitting in here, and a dog in it, he would be in a primary enclosure. If a dog was in this room, the room would be a primary enclosure, as opposed to the kennel facility, which would be all the other cages." (Dep. 20, 21)

26. With respect to what is depicted in Exhibit 3, Mr. Ginn testified:

"Q. With respect to dogs, first, what would you, in terms of weight, if we could, what would you call a medium size dog, and what would you call a large dog, in your own judgment as a compliance officer?

"A. I think when we are talking about a large dog, we are getting into the collies, police dogs, heavier hounds than that. And, I suppose, we are getting anything over, oh, I don't know, maybe over 40 pounds.

"Q. Okay.

"A. Medium size dogs would probably run into between 15 and 30 pounds, somewhere in there. I have never really paid that much attention to weight, I have been more interested in their size.

"Q. Well, let me show you now a picture that has been entered into evidence as Exhibit No. 3 and ask how would you characterize those dogs, with respect to size? You wouldn't call those small dogs, would you?

"A. *I think I would have to say from the looks of them I would call them medium dogs.* (emphasis added)

"Q. But you would say they probably weigh at least 40 pounds each, wouldn't you?

"A. *Probably between 25 and 30, I would think.* (emphasis added)

Mr. Ginn did not find the photographic exhibits to be convincing:

"Q. Now, for the purpose of my question, let's assume that the cage they are in, the two dimensions, the floor dimensions are 32 inches by 70 inches. So we are talking about less than three feet by about almost six feet. How many dogs of this size would you say could fit in a cage like that and be in compliance with the regulations, in your judgment?

"A. 32 by 70 inches?

"Q. Yes.

"A. I have to answer that this way, I can't give you a yes or no on that. If these dogs are less than 32 inches long—in other words, if they are not having a problem on the narrow side of the cage, then I would suppose that you could probably get probably five dogs in there. And this is a very wild guess, because if I ever confronted this, I would have a piece of paper and a scratch pad, and do a little figuring.

"Q. Let me ask this: Would you think that there would be any dogs this size—you wouldn't think you could get, for instance, six, of what we have seen to be medium size dogs, maybe 35 pounds, into a cage that is only 32 inches by 70 inches?

"A. *I wouldn't think so. (emphasis added)*

"Q. And seven would certainly be out of the question?

"A. Right. But this is an awful hard call to make *until you have seen the dogs and everything. (emphasis added)*

"Q. I understand. Let's turn now to cats.

"A. Right.

"Q. Again, if we assume, and, by the way, these dimensions I am giving you are exterior dimensions, so the interior dimensions are going to be a couple inches less. If we assume a cat cage where the exterior dimensions are one foot high, two feet wide by three feet deep—

"A. Yes.

"Q. —and we are talking about adult cats now, not kittens, the floor area of that space is actually six square feet, right, to feet by three feet, do you have an estimation of how many cats you think you could fit in there and meet the requirement that they could all lie down at the same time, or they could stand up freely, and turn about freely?

"A. Just off the top of my head, I would probably go for a square foot per cat.

"Q. So you would say six?

"A. Yes.

"Q. So once you get—would you say that is close to a maximum amount you would be able to get?

"A. Not over eight, not over eight.

"Q. You think you might be able to have less than one square foot per cat?

"A. This is possible. I mean, let me think about that for a minute, please.

"Q. Take your time, we have no place to go.

"A. Yes, I think you could get—to qualify this, you could get by with less than one square foot per cat transporting these animals.

"Q. We are talking now only about transportation?

"A. I would say you could. I am not saying this is going to be within the regulations, but I am going to say I think you could do this.

"Q. Well, for the moment, let's stick with the regulations; do you think that would comply with regulations? Do you think a cat, a full-grown adult cat can lie down in less than one square foot of space?

"A. I would say that I would stick with a square foot.

"Q. So they wouldn't be able to do it with less than a square foot?

"A. I wouldn't think so, no.

"Q. And we have already determined that six square feet is a little overstated, because these are the external dimensions. So if you got more than six adult cats—

"A. Yes.

"Q. Now, if I can show you, to help you out, what has been marked as Exhibit No. 2, it is a picture of some cats in cages. I think that the middle cage is among the most visible.

"A. Yes.

"Q. Now, how many cats can you count in that middle cage?

"A. I think I am getting six here. One, two, three, and there is a black one, that looks like another one—six, probably.

"Q. And picturing now, since you are able, aren't you, to see, in a sense, the whole front of that cage, obviously it is not a three-dimensional picture.

"A. Yes, sir.

"Q. Do those cats look like that would have enough room to, if they all chose to, lie down at the same time without crowding each other?

"A. Yes, I think so, because, you see, you have got what looks like two or three inches—probably three inches over here, and you have got the back part of the cage here. I am sure they could.

"Q. But they are not all lying down now are they?

"A. Well, there are two of them that appear to be standing up, or scooting, and the other three appear to be either crouching or lying down.

"Q. Okay. But again, if we assume that there were two more cats in that cage than there are, if we are to assume there were eight cats in a cage like that, would they all have room to lie down at the same time?

"A. That would appear to be overcrowded, if you had any more cats than that in there, but I would say that number of cats in there looks to me to be all right."
(Dep. 25, 26, 27, 28, 29, 30)

* * * * *

"MR. TRACY: No. 2 is the one cat picture we have, and No. 3 is the one of the dogs.

"Q. Exhibits 2 and 3.^a One showed a group of cats in a cage, and one showed a group of dogs in a cage. From your observation of these pictures, would you say that these animals were overcrowded?

"A. Well, the dogs certainly don't appear to be overcrowded. I mean, what you can see here, you can see three dogs in this cage, and you can see space back behind them. They don't—I have no idea how far this cage goes this way (indicating), but, no, I don't think they are overcrowded. I don't think in either case they are overcrowded.

"Let me just take another look at those cats. And I want to point out something here, in my opinion, I am saying these animals are not overcrowded, but this is if we are talking about more than one animal per cage. I don't think they are overcrowded for being transported, no, sir. But I will add that the cats certainly couldn't take any more cats in there, it looks that way." (Dept. 39, 40)

27. Because of Mr. Ginn's expertise, and inasmuch as he had had occasion to personally examine Mr. Leach's trucks when they went out to load and, also, when they came in with a load at Mr. Leach's facility, (Dep. 32), further direct quotes of his testimony are in order:

^a It is obvious that Mr. Ginn, a long time Compliance Officer, and one acquainted with the Respondent, his facilities, his records, and his trucks, differed materially with Complainant's witnesses' conclusions and opinions relative to what is depicted in Exhibits 2 and 3.

"Q. Mr. Ginn, as far as litter is concerned, in your experience, is it ever rearranged with occupancy of the animals? In other words, If there is litter on the floor, and there are a number of animals in the cage, do they sometimes scrape the litter back from the areas of the floor and leave bare spots?

"A. Well, yes, sir. I don't think you can—I don't think you can say that this litter is going to contain all of the fecal matter, neither. I mean, because I have seen so many times where dogs come in, particularly on airline shipments, where there is shredded newspaper that high (indicating), and yet they will still have fecal matter smeared on them.

"What we are trying to get, in my opinion, is a reasonable way to contain this stuff to the best possible way to treat the animal. I don't think we can ever reach the situation where we are going to get every drop, or anything like that. And, true, if you bred any type of animals, you are going to get scrapes here and there.

"Q. So, in short, in applying the regulations, you undertake to use common sense and seek to attain the end that the regulations are seeking?

"A. Yes, sir, in my opinion this is true. I mean, I think, in these animals welfare regulations, that the important thing that we are thinking of is the animal. We are really not worried what the thing looks like, or how the paint job is on the truck, or anything like that. We are thinking of the safety, and the health, and the well-being, and comfort of the animals. That's the paramount reason for our existence.

"Q. Something was said about the requirement or the necessity of cleaning the cages periodically to render them clean enough. What interpretation would you put on clean enough, Mr. Ginn?

"A. This is a judgment call. I mean, it is a very hard question to answer. Personally, myself, my personal opinion would be if I can look at an animal, and I can tell if he is feeling kind of miserable and that, and I can tell whether it is just completely nasty inside that cage, there is manure all over the place, and he is soaking wet from urine, or anything like this, or even to the slightest degree he is that way, at that time I feel a clean-up is required and needed.

"And I don't go so far to say that you are going to have to stop that truck and scrub that cage out to keep the animal comfortable, you might have to stop that truck and pull out your hay and your shredded paper, or whatever you are using, and replace it, or maybe just add some more. This is a thing that we have to hope that the animal handlers will take some reasonable action on, and, of course, we understand that we probably don't have the highest caliber of people doing these type of jobs. And, so, Mr. Leach is a very important—it is paramount to him that he keeps on these people and lays hard and fast rules down.

"Now, whenever this truck is stopped, I want you to go in and make sure these animals are clean, and decent enough, and things like that:

"Q. *But, in short, it is a judgment matter?* (emphasis added)

"A. Yes, sir. (Dep. 36, 37, 38, 39)

28. Included among the testimony of the witnesses was that of Dr. Gerald S. Borman, a veterinarian, Director of the Division of Animal Resources of Eastern Virginia Medical School. His education consists of a Bachelor's Degree from the University of Pittsburgh, and he was graduated with a Bachelor of Science from the University of Pittsburgh; a Master of Science Degree from the University of Wisconsin; a Doctorate of Medicine from the University of Pennsylvania, and a post-doctorate of fellowship from Johns Hopkins University School of Medicine. He was licensed to practice veterinary medicine in Massachusetts and Pennsylvania. His testimony indicates that he was employed by the Eastern Virginia Medical Authority, a private institution that was created by an Act of the Legislature of Virginia and that it was the employer of the faculty of the Eastern Virginia Medical School. This school operated

on certain Federal grants. In his function with the school, Dr. Borman played several roles, the major one was that of director of an animal facility that acquires animals for the faculty for their use in research and, in addition, for teaching for the purpose of training surgeons and other emergency care physicians. Also, Dr. Borman is professor of microbiology.

He testified that with respect to his function of acquiring animals in medical research and in the examination thereof relative to the use of animals in medical research, he had the responsibility of establishing criteria by which the animals were used in the animal resource program, which specified what each investigator intended to do with the animals he acquired. The research proposal was reviewed by Dr. Borman as well as a committee of our senior members of the facility that sit on the animal study subcommittee.

In addition to that, the care and use of the animals are conducted in accordance with a guideline publication of NIH which spells out how the animals could be used and cared for in the United States. Those guidelines are entitled: "Principles of Care and Use of Animals." Each investigator's proposal had to be accompanied by certain data.

In short, Dr. Borman indicated that in order to do research, such research project has to be approved by the committee described aforesaid.

With respect to Dr. Borman's knowledge and association with Leach Kennels, the Respondent, he indicated that he had had this association for the last seven years and that he had examined all of the animals that were delivered. His facility primarily obtained dogs from Mr. Leach.

During the year preceding the hearing, Dr. Borman had examined a little over 200 dogs that had been received from Leach Kennels by his facility. Such animals had no scratches or bite wounds or contamination that would interfere with their research. Dr. Borman indicated the animals were in excellent health and they appeared to be well fed, and their condition was very good for use at the research facility. The condition of the animals had to be very good, and had there been any lesions or matters of that nature such would have been detected by Dr. Borman's examination.

29. Appearing on behalf of the Respondent were the two truck drivers, Mr. Hayes and Mr. Queensbury. Included in the testimony of Mr. Hayea was the procedure whereby the cats were tagged.⁷

⁷ "Q. Now, tell us how you did that? What did you use to tie the number around the neck?

"Q. Now, is this what you all did on this particular occasion?

"A. Every trip.

"Q. Now, were there any animals that were left untagged?

"A. No." (Tr. 120, 121)

30. Additional testimony of Mr. Hayes reflects that he kept a log book with all the numbers of all the dogs. (Tr. 122, 123)

31. Mr. Hayes indicated that he attempted to carry out the instructions which had been given to him by Respondent Leach, namely, not to overload the cages, to keep the litter clean, and to feed the animals between stops as well as having the cages cleaned. Mr. Hayes' testimony indicated that although he watched the person he hired to clean the cages, that the dogs were not taken out of the cages when they were cleaned. (Tr. 129)

32. Mr. Hayes' testimony with respect to the tagging of the cats was that if the tags were not visible on the photograph, his explanation for lack of visibility was: "You put those tags around a cat's neck tightly and snug—I've delivered them for 15 years—and a lot of the places we carry them for research, each cat has to be taken off and checked, his number around his neck, and on the list, and it takes sometimes 5 minutes to twist that string and turn it to find the tag. With the long hair you've got to feel around, and dogs are the same way. You cannot see it by looking at it. You can take a picture and it won't show up." (Tr. 134)

33. Mr. Hayes' testimony was corroborative of that of Mr. Ginn's with respect to the litter in that Mr. Hayes testified:

"A. It's a little cord, a string you run through the tag and tie it one time, then you tighten the string and tie it around the cat's neck, tight so that the cat can't get his claws in between the string and get it up in his mouth, which normally they do if the tag is tied too loose. A cat can get his paws in there and pull a tag into his mouth and get hung in it, so they tied snug."

"A. I started to say that you can put—I don't know how much it required, but we put enough to cover the space. But if you stay there, I mean, you can stay there maybe 20 minutes and some animals scratch it back and kick it and knock it out of the side of the cage, or push it under there, and some it will stay in there, maybe, all day, just the condition or the way the animal acts. And you can put it in there, I'll tell you, all you can get in there and get it half full and some of them are going to get it back all on one side or in the corner and have an empty bare space on the floor." (Tr. 135)

34. The weight of the persuasive evidence is that the animals in question were properly tagged and identified at the time they were picked up at the various animal shelters, that proper log sheets were kept thereon, which log sheets and numbering were subsequently checked by the recipient medical research institutions.

35. Further corroborating the testimony of previous witnesses was Mrs. Karriker, who, although not present on May 28, 1982, is an Animal Control Officer for Catawba County and has been so employed for eight years. She unequivocally indicated that over this long period of time there were never occasions when the animals were not tagged (Tr. 159); she had never experienced offensive odors coming from the truck and she had not seen fighting among the animals.

CONCLUSIONS

This Decision is somewhat lengthy because I wanted the party litigants to appreciate the extent and nature of some of the varying testimony, evidence, as well as the exact wording of the Regulations involved. Despite its length, not all the evidence is recited herein; the entire record evidence furnishes the basis of this Decision.

It is hoped that the parties for both sides can appreciate my function under the Administrative Procedure Act as being one to find facts based on the evidence adduced at the oral hearing and to render a decision premised upon applicable legal principles.

I avoid, purposely, the issue of the correctness of society's utilization of animals in medical research. It is an issue encompassing merit and serious concern to advocate holding diverse opinions. As of now, the law permits the use of animals for medical research and any change in the law must be addressed to the legislative branch of our Government. I do, however, have to be mindful of

certain fundamental legal precepts: that for a person to have a penalty imposed upon him, he must have violated a law, and such violation must be proven. Otherwise, each case would be decided by the individual inclinations of each Judge—a result not desired by members of society as a whole.

This Decision has been arrived at, taking into consideration certain fundamental concepts: The Animal Welfare Act, and the Regulations which the Secretary of Agriculture has promulgated. The sole question to be decided is whether the Respondent violated the aforesaid. It is not whether the transportation facilities of the animals were what I, or some one else, would have preferred. Also, I am compelled to observe legal concepts such as, the Government has the burden of proof to show that a wrong was committed; that the laws of evidence and persuasiveness must prevail; and, that fairness and due process of law be observed. Otherwise, all Respondents would have taken away from them the safe guards of our legal procedure.

Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 566(d)) provides, in part, that a sanction may not be imposed or rule or order issued except in accordance with * * * substantial evidence; thus establishing a standard of proof, and the standard so established is the traditional preponderance of the evidence standard; it being within the power of Congress to make that choice. The courts in the absence of countervailing considerations are not free to disturb it. *Steadman v. S.E.C.*, 450 U.S. 91 (1981).

Although in this case, the Complainant has come forward with a *prima facie* case, Respondent's evidence has discredited or rebutted it.

This case is to be distinguished from those involving administrative construction; the present case involves subjective application of regulatory standards susceptible of differing interpretations and application. For instance, "sufficient quantity" of litter in § 3.12 (e) is not defined—other than the purpose to be achieved by it. There is persuasive evidence of record to the effect that litter will shift or be moved about by the animals once it is put inside a cage. Under such circumstances, what is enough litter can be a matter of opinion.

Similarly, with respect to the number of dogs or cats in a cage, there is no precise verbiage which states the amount of space to be allocated per animal. The evidence in this case is not clear as to whether, on May 28, 1982, the dogs involved were medium or large dogs, nor the weight thereof. Even the testimony of Mr. Carey and Mr. Herman was not reflective of *their observing* an animal that could not turn freely in a standing position using normal body

movements to stand and sit erect, and to lie in a natural position. Respondent's employees had adequate empty cages if they had believed the ones in use were overloaded.

The declared Congressional policy was to assure the humane treatment of animals during transportation in commerce. The evidence in this case does not reflect inhumane treatment of the animals which Mr. Leach transported.

Mr. Leach testified in his own behalf. Among the contentions of the Respondent is that Mr. Leach has done everything that is reasonable to comply with the Act and the Regulations; that the complaints against him were not initiated by members of the Department of Agriculture who did in fact participate in the investigation itself but rather the charges here involved originated by reason of actions of the Humane Society whom the Respondent maintains has set up their own standards and accordingly Mr. Leach has been judged thereby.

Mr. Leach has been in the business of collecting and selling animals for twenty years and has never had a formal disciplinary complaint lodged against him, until the present one. Among the institutions Respondent sells animals to are: A. H. Robbins (a pharmaceutical company), Medical College of Virginia, the Veterans Administration, University of Virginia, Georgetown University, Howard University, Washington Hospital Center, Childrens Hospital, and Eastern Virginia Medical Academy. Any deficiencies for which Mr. Leach was cited were promptly remedied.

This is not a record of flagrant or wilful abuse or inhumane treatment to animals while in transit. The testimony of Mr. Leach, Mrs. Kanriker, Dr. Borman, and Compliance Officer Ginn reflects a bona fide effort by Respondent to do what the APHIS people required of him. Both at the oral hearing and on brief the Government stipulated that medical research with animals is not an improper thing. (Tr. 170)

The Complainant indicates, on brief, that it "supports" medical research using animals. The Animal Welfare Act assumes the eventual use of animals for such purposes. The issue in this case is how the animals were handled while being transported.

There is an admission in the evidence that Respondent's employees failed to remove the dogs from the cages when the cages were cleaned by a hosing method. (Tr. 115, 129). Although Respondent argues that he was not charged with this violation in the Complaint, Paragraph 6(b) thereof sufficiently apprises Respondent of the allegations against it.

Respondent is responsible for any laxity, or omission on the part of his employees, and those who were paid to clean out the cages. It will be noted that although Complainant has not shown that the animals became wet, etc. because of failure to remove them from the cages, nevertheless, it may rely upon this admission against interest by Respondent's employees.

The only violation which the record discloses is one of admission by the Respondent's employees that they did not remove the dogs from the cages when the cages were cleaned by a hosing method.

The evidence, as a whole, is not of such persuasiveness, and, in fact, it fails to show, that the dogs and cats did not have tags; that the primary enclosures containing the dogs and cats were not cleaned as required by 9 CFR §§ 3.7(a) and 3.12(e); that there was a sickening odor in violation of 9 CFR § 3.13(e); that some of the animals were not housed in compatible groups; that the primary enclosures did not contain clean litter as required by 9 CFR § 3.12(e); or that there was such over-crowding of the cages as to be in violation of 9 CFR § 3.12(c).

The evidence herein indicates that the Respondent sought to be in compliance with the Act and the Regulations thereunder. Whenever alleged deficiencies were brought to his attention, they were immediately corrected. His instructions to his employees were those of achieving compliance. The record herein fails to show that a warning letter was ever sent to Respondent, allowing him the opportunity to correct the alleged deficiencies set forth in the Complaint.

A fine, or a suspension, is not called for in this case in order to achieve the purposes of the Act and the Regulations.

However, Respondent's employees failed to remove the dogs from their cages while the cages were being hosed down. For this laxity on the part of his employees, a cease and desist order is appropriate, in order to assure that Respondent's employees properly carry out the Respondent's instructions to comply with the Act and the Regulations thereunder.

ORDER

Respondent, his agents and employees, directly or indirectly, shall cease and desist from failing to comply with the requirements of the Act and the regulations and standards thereunder.

All motions, requests, suggestions, and otherwise of the parties have been duly considered, and to the extent they are inconsistent with this decision, they are denied.

This Decision and Order shall become final 35 days after service thereof, unless appealed to the Secretary as provided in the Rules of Practice and Procedure, 7 CFR § 1.130, *et seq.*

Copies hereof shall be served upon the parties.

COURT DECISIONS

In the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY C.V. No. 81-1729, TOSCONY PROVISION COMPANY INC. v. JOHN R. BLOCK, SECRETARY OF DEPARTMENT OF AGRICULTURE FMIA Docket No. 40. Decision by Harold A. Ackerman (USDJ).

The Court: Plaintiffs, Toscony Provision Company, Inc. (Toscony) and Henry Dei, seek judicial review of a Decision and Order issued by the Secretary of Agriculture (Secretary) withdrawing a grant of Federal meat inspection services from plaintiff corporation. Defendants are John Block, Secretary of the United States Department of Agriculture (USDA) and the United States. This case is presently before me on defendants' Motion to Dismiss, or in the alternative for Summary Judgment, and on plaintiffs' Cross-Motion for Summary Judgment filed on short notice with this Court.

The undisputed facts are as follows: On March 30, 1979, both Toscony and Henry Dei were convicted of one felony count each for knowingly distributing meat food products after adding the chemical imidazol thereby causing the products to become adulterated in violation of Section 10 of the Federal Meat Inspection Act, 21 U.S.C. Section 610.

On December 6, 1979, the Administrator of the Food Safety and Quality Service (FSQS) (now called the Food Safety and Inspection Service (FSIS)), United States Department of Agriculture, filed an administrative Complaint against Toscony Provision Company, Inc., Respondent. The Complaint alleged that Toscony was unfit to engage in any business requiring Federal meat inspection services, within the meaning of Section 401 of the Act (21 U.S.C.) Section 671, because of the felony convictions of both Toscony and its president and majority stockholder, Henry Dei.

An oral hearing was held before Administrative Law Judge Victor W. Palmer on September 16-17, 1980, in New York, New York. Following submission of post-hearing briefs, Judge Palmer issued a Decision and Order on February 27, 1981. Judge Palmer found that Toscony was unfit to engage in any business requiring Federal meat inspection services due to the felony convictions and issued an Order: (1) withdrawing Federal meat inspection services unless Henry Dei disassociated himself from Toscony within a specified time period, (2) providing for a two-year probation period for Toscony, and (3) unconditionally withdrawing Federal meat inspection services from Toscony for a 30-day period.

This initial Decision was appealed to the Secretary on April 6, 1981. On May 6, 1981, Donald A. Campbell, the Judicial Officer for the Department of Agriculture (who is delegated authority by the Secretary to make final decisions in such proceedings), issued a De-

cision and Order upholding Judge Palmer's Decision and Order in all aspects, except as to the 30-day unconditional withdrawal period which was deleted from the Order. On May 22, 1981, Toscony requested a stay of the Order pending appeal to the United States District Court. The stay was granted by the Judicial Officer on May 29, 1981.

On June 8, 1981, Toscony and Henry Dei filed a Complaint in the United States District Court for the District of New Jersey for review of the final Decision. The District Court affirmed the Judicial Officer's Decision and Order on May 3, 1982 and granted plaintiffs' Motion for a stay of the Secretary's Decision and Order pending appeal on July 26th.

An appeal was then taken by plaintiffs to the United States Court of Appeals for the Third Circuit. On November 19, 1982, upon consent of the parties, the Third Circuit remanded the case to the District Court for a determination of the appropriate administrative level for a consideration of mitigating circumstances. The District Court remanded the case to an Administrative Law Judge to consider mitigating circumstances on July 5, 1983.

On August 1, 1983, defendants filed a Motion to reopen administrative proceedings. Subsequently a second oral hearing was held before Judge Palmer on December 9, 1983, in New York City. His final Decision and Order filed May 18, 1984, indefinitely withdrew Federal meat inspection services from Toscony unless Henry Dei disassociated himself from Toscony as a partner, officer, director, shareholder, or employee, and provided no further direction or advice to or exercised any control over Toscony, and disposed of his Toscony stock within one year.

Under the USDA rules and regulations, plaintiff had 30 days after service of the ALJ's Decision and Order to file a timely appeal. See 7 CFR Paragraph 1.145 (a) and (c).

On May 21, 1984, Judge Palmer's Decision and Order was forwarded to Nicholas H. Politan, Esq. of Checki and Politan, plaintiffs' attorneys. Upon its receipt, an office employee was instructed to deliver it to Jan Alan Brody, Esq., the member of the firm responsible for the responsibility of all brief writing in this matter. However, as a result of an inadvertent mistake, the Decision and Order was placed directly in the office file and, as a result, a timely appeal was not filed.

The omission was discovered upon receipt on July 6, 1984 of the Hearing Clerk's notice of effective date of Decision and Order. At that time plaintiffs' Counsel immediately notified the Judicial Officer of their error by telephone and filed a Motion to extend the

time within which the plaintiffs may appeal. The Judicial Officer issued an Order denying late appeal on July 12, 1984. In this Order he concluded that plaintiffs' failure to file a timely appeal was "a case of excusable neglect," however, he denied the Motion based upon his conclusion that he was without jurisdiction to grant such an application.

The Judicial Officer thus held that he had no jurisdiction to review plaintiffs' appeal. However, in the event that a District Judge reached the merits, the Judicial Officer, upon reviewing the merits of plaintiffs' appeal, concluded that he would have adopted the Administrative Law Judge's initial Decision and Order as the final Decision and Order giving "little or no weight to any of the circumstances regarded by respondent as mitigating."

Plaintiffs were granted leave by this Court on September 10, 1984, to file an amendment to their Complaint for the purpose of securing judicial review of the Administrative Law Judge's Decision and Order conducted in accordance with the Third Circuit Court of Appeals and District Court Remand Orders.

Defendants argue that this Complaint seeking judicial review should be dismissed for failure to exhaust administrative remedies in that plaintiffs failed to timely appeal the ALJ Decision and Order after remand to the Secretary. In the alternative, they contend that even if this Court decides to review the agency on its merits, judgment should be granted in defendants' favor under the applicable standard of review.

In opposing defendants' Motion and in support of its own, plaintiff contends that the exhaustion doctrine should not deprive a litigant of judicial review where its purposes would not be served by requiring exhaustion. Further, citing extensively to the record on remand, plaintiffs contend that the ALJ's Decision was arbitrary and capricious, unsupported by substantial evidence and that his Order as not necessary to effectuate the Federal Meat Inspection Act as required.

I turn first to defendants' Motion to Dismiss for failure to exhaust administrative remedies. It is not disputed in these proceedings that out of "excusable neglect," in the form of law office failure, plaintiffs' Counsel, who have actively litigated the charges against defendants in a timely manner on all but one occasion, failed to file a timely appeal of the ALJ's Decision and Order on remand to the Secretary or Judicial Officer. It is similarly undisputed that judicial review of administrative agency action is available only when "made reviewable by statute (or where) final agency action for which there is no other adequate remedy in a

court" has been taken. See Administrative Procedure Act, 5 U.S.C. Section 704.

The Rules of Practice for the USDA specifically provide "(t)hat no decision shall be final for purposes of judicial review except a final decision of the judicial officer upon appeal." 7 CFR Section 1.142(c).

Further, it is not disputed that it is a "long rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

However, Courts have declined to apply this general rule where "no purpose would be served by deferring review." See *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 907 (3d Cir. 1982), or where "none of the basic goals (of the doctrine) would be served" thereby. See *Bradshaw v. Carlson*, 682 F.2d 1050, 1052 (3d Cir. 1981). I have omitted the citations and quotations. See also *Energy Cooperative, Inc. v. U.S. Department of Energy*, 659 F.2d 146, 148-49, decided by the Temporary Emergency Court of Appeals in 1981.

The Court in the *Energy Cooperative* case enunciated several purposes of the exhaustion doctrine, including the necessity of development of a factual record before judicial review; the aid to the Court arising out of prior review by an agency with expertise and the opportunity for the agency to correct its own "mistakes" potentially obviating the necessity of judicial review.

I note also that in the context of Federal habeas review of State Court criminal proceedings, while exhaustion of State remedies is ordinarily required, Federal Courts are empowered to look beyond procedural forfeitures in the State Court proceedings. *Reed v. Ross*, No. 83-218, slip op. at Page 8 (decided June 27, 1984). Where a habeas petitioner failed to abide by a State rule thus forfeiting his opportunity for State review of a claim on its merits, a Federal Court may still review the claim if petitioner can show cause for an actual prejudice from the default. See that *Reed* Opinion at Pages 9 and 10.

However, Counsel "may not flout State procedures and then turn around and seek refuge in Federal Court . . ." See slip op. at Page 12. But if the procedural default was "excusable" and was "not attributable to an intentional decision by Counsel made in pursuit of his clients' interests," a Federal Court will entertain the claims. See slip op. at Pages 12 and 13.

I find that in a case where a full factual record has been developed by the agency and the agency itself has found that the default was not intentional but due to excusable neglect on the part of

Counsel not designed to flout administrative procedure for tactical reasons, it is appropriate for the Court to overlook the default and review the agency action on the merits.

Using the test employed by the Supreme Court in the context of habeas review, I find that plaintiffs had cause for the default and will be prejudiced if this default deprives them of all judicial review. See also *Energy Cooperative* cited supra at Page 149.

I note further that in this case no administrative procedure or remedy remains to be exhausted; plaintiffs have done everything they could to obtain review of the ALJ's Decision under the circumstances. I will, therefore, consider the pending Cross-Motions for Summary Judgment on their merits. I note that no remand is necessary in this regard because the Judicial Officer did reach the merits in an alternative holding.

The Administrative Procedure Act provides in pertinent part that "(t)he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (E) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . . " 5 U.S.C. Section 706(2) (A) and (E).

(1947), this Court should uphold a decision of less than ideal clarity if the agency's path of decision-making may reasonably be discerned. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945); see also *Bowman Transportation, Inc. v. Ark-Best Freight System*, 419 U.S. 281 (1974).

Therefore, in order to prevail in this action, plaintiffs must demonstrate that the Secretary's actions were contrary to law in either substance or procedure, or that the evidence contained in the administrative record does not support the decision made.

I have decided, for the reasons set forth below, that the Secretary's decision should be affirmed under this standard. Section 401 of the Act (21 U.S.C. Section 671) provides that: The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this Act) refuse to provide, or withdraw, inspection service under Title I of this Act with respect to any establishment if he determines, after opportunity for hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under Title I because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in Federal or State Court, of (1) any felony, or (2) more than one violation of any law, other than felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food.

In order to effectuate the purpose of the Act, the Secretary was given authority in Section 401 of the Act to refuse to provide, or to withdraw, inspection services pursuant to certain convictions. The Secretary's authority has been interpreted to extend to those cases where substantial evidence indicates that the conviction of certain crimes is related to a company's fitness to conduct a business requiring Federal meat inspection services. See *In re: Norwich Beef Co.*, 38 Agric. Dec. 380 (1979), *aff'd*, No. H79-210 (D.Conn. Feb. 6, 1981), appeal dismissed, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re: Utica Packing Co.*, 39 Agric. Dec. 590 (1980), *aff'd*, 511 F.Supp. 655 (E.D. Mich. 1981), *remanded on other grounds*, No. 81-1383 (6th Cir. Sept. 2, 1982) *In re: Wyszynski Provision Company*, 40 Agric. Dec. 17 (1981), *aff'd*, 538 F.Supp. 361 (E.D. Pa. 1982).

On remand, after a full hearing on the question of mitigating circumstances, Judge Palmer reiterating his prior conclusion in this regard stated: The entire record, the briefs and arguments by Counsel have been fully considered to determine the appropriate sanction that should be imposed in this proceeding. I have concluded that respondent and Mr. Dei's felony convictions for knowingly

distributing adulterated meat strike at the very heart of the Federal meat inspection program, and the mitigating circumstances of Mr. Dei's otherwise excellent reputation among business, professional, and social acquaintances and virtually blemish-free record both before and since the felonies is not sufficient to allow inspection service to continue at respondent's plant unless Mr. Dei disassociates himself from the corporation and divest himself of all its stock that he owns. See the transcript T-27 at Page 4.

After making findings of fact and conclusions of law, Judge Palmer concluded as follows: I have followed the Department's policy and have determined that despite the fact that Henry Dei otherwise has an excellent reputation among his professional, social, and business associates, he has nonetheless committed one of the most egregious violations imaginable under the Meat Inspection Act. He endangered the physical health and well-being of respondent's customers by his surreptitious addition of a deleterious chemical substance to the sausage prepared and distributed by his company. The criminality of this conduct far outweighs his otherwise excellent reputation and respondent's otherwise good record both before and since. Therefore, Federal meat inspection should be withdrawn unless Henry Dei becomes disassociated with the plant. See the transcript T-27 at Page 10.

In dismissing plaintiff's appeal and denying their Motion for leave to appeal out of time, the Judicial Officer, as noted supra, considered the merits so as to avoid the necessity for a remand should a Federal Court reach the merits as I have. The Judicial Officer stated: . . . in an effort to avoid undue delay in this proceeding (which involves the public health), in the event that a Court should disagree with my Order denying a late appeal, I have reread the original record in this proceeding, and have read the supplementary record made after my original decision in this proceeding. If an appeal had been timely filed, I would have adopted Judge Palmer's initial Decision and Order as the final Decision and Order in this proceeding, adding additional conclusions emphasizing that I give little or no weight to any of the circumstances regarded by respondent as mitigating. Respondent has a great volume of evidence alleged to be mitigating, but the great volume is of no consequence since each item has little or no weight. Even a thousand times zero is still zero!

This is not a close case. In fact, the circumstances regarded by respondent as mitigating are of such little weight that I would have regarded an appeal almost as frivolous, or solely for delay.

While I do not agree that Mr. Dei's reputation in the business community and among his family and friends as well as his "blem-

ish-free record" both before and after the crimes for which he was convicted should be weighed as a "zero" against his conviction in determining fitness under the Act, I find that the Secretary's decision that plaintiff's job-related conviction outweighed the evidence of mitigating circumstances is neither arbitrary nor capricious on the record before me.

While the record is replete with evidence of Plaintiff Dei's good character, there can be no argument that the felony conviction in question is job-related and thus at the heart of any determination of fitness under the Act. Although the Act permits withdrawal of inspection services by the USDA upon conviction of any felony where there is a finding of unfitness, this is not just *any* felony. I agree that it would be improper for the Secretary to equate another sort of felony conviction with unfitness automatically. Here, however, the Secretary was presented with a felony conviction for willfully distributing adulterated meat products. More than impressive character testimony is necessary to outweigh the implications of unfitness which inhere in a job-related conviction such as the instant one.

I recognize that Plaintiff Dei is in the "twilight" of his business career at age 75. I recognize as well that Plaintiff Toscony Company needs Mr. Dei as much as he needs it. I recognize, too, that in light of these facts and the mitigating evidence introduced at the hearing the sanctions imposed are severe insofar as he is concerned. I am not unsympathetic to Mr. Dei, but I am compelled to conclude that the sanctions imposed are neither arbitrary or capricious in light of the record herein and the public's interest in health and maintaining high standards of food preparation and distribution which are reflected in the Act.

Decision will, therefore, be affirmed.

DISCIPLINARY DECISIONS

In Re: GOLDEN WEST MEAT COMPANY INC. FMIA Docket No. 70. Decided January 11, 1984.

Respondent having been convicted of 12 misdemeanors for the preparation, sale, and transportation of adulterated meat food products. For this reason it is concluded that the respondent is unfit within the meaning of the Act to engage in any business requiring Federal meat or poultry inspection services.

Kris Ikejiri, for complainant.

James Meaney, Trenton, Georgia, for respondent.

Decision by Victor Palmer, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding under the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*) and the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*). It was instituted by a complaint filed on June 24, 1983 by the Administrator of the Food Safety and Inspection Service seeking to withdraw and deny federal meat and poultry products inspection services from the respondent because of its conviction of 12 misdemeanors for the preparation, sale and transportation of adulterated meat products which, the complaint alleges, shows it to be unfit to engage in any business requiring inspection under 21 U.S.C. § 671 and 21 U.S.C. § 467.

An answer was filed on behalf of the respondent, a corporation, by its president, William R. Hicks, on July 25, 1983, in which he requested an oral hearing. On August 30, 1983, counsel for complainant filed a Motion to Limit Issues at Hearing. On September 6, 1983, I ruled that respondent's failure to file its answer within the time prescribed by the rules of practice would not be ruled to be an admission of the complaint's allegations and that the burden remained upon complainant to prove that respondent had been convicted of more than one misdemeanor based upon the acquiring, handling or distribution of unwholesome, mislabeled or deceptively packaged food or upon fraud in connection with transactions in food. I further ruled that upon proof of respondent's conviction as the complaint alleges, any issue found to have been determined at that time would not be relitigated in this proceeding, but that respondent would not be foreclosed from showing mitigating circumstances surrounding the convictions. Prehearing conferences were conducted by telephone, on September 21, 1983, and in person immediately prior to the oral hearing held in Atlanta, Georgia, on September 27, 1983. Complainant filed a Hearing Memorandum and, on October 3, 1983, a Proposed Order. At the hearing, Mr. Hicks indicated that he would not file proposed findings, conclu-

sions, or arguments. On October 18, 1983, a letter from James A. Meaney, III, attorney, Trenton, Georgia, to complainant's counsel was filed with the Hearing Clerk which advised that respondent had relinquished its assigned USDA Number 2119 and requested that this proceeding be dismissed on that basis. On November 23, 1983, a letter from Mr. Meaney was received by the Hearing Clerk requesting that it be considered as his appearance as respondent's counsel, and asking for a photostatic copy of the record in this proceeding. The Hearing Clerk complied and on December 2, 1983, Mr. Meaney's office signed a receipt for the copy of the Administrative File sent it by certified mail.

On November 30, 1983, complainant filed a motion requesting that a decision be issued since the period for a timely response had lapsed and the operative and uncontroverted facts showed respondent's unfitness under the statutes and the sanction requested, withdrawal of federal inspection, would not cause any hardship to a firm that is no longer in business as respondent and Mr. Meaney allege. A copy of the motion was sent by the Hearing Clerk by certified mail to Mr. Meaney and his office acknowledged its receipt on December 6, 1983. No response in opposition to the motion has been filed.

I have decided that complainant's motion correctly states the facts, the law, and the present status of this proceeding and that no useful purpose will be served by delaying further the issuance of a decision.

For the reasons herein stated, federal meat and poultry inspection services are withdrawn from respondent, its owners, directors, successors, affiliates or assigns for a period of three (3) years.

FINDINGS OF FACT

1. Respondent is now, and at all times material was, a corporation which operates a meat and poultry processing establishment in Wildwood, Georgia, and is a recipient of federal inspection services under Title I of the FMIA and under the PPIA. Respondent's mailing address is P.O. Box 123, Wildwood, Georgia 30757.

2. William R. Hicks is now, and at all times material was, the president of, a holder of 10% or more of the voting stock in, and responsibly connected with the Respondent.

3. On or about November 8, 1982, in the United States District Court for the Northern District of Georgia, Rome Division, the respondent was convicted of twelve (12) misdemeanors for the preparation, sale, and transportation of adulterated meat food products, in violation of the FMIA and the regulations promulgated thereunder.

4. On or about November 8, 1982, in the United States District Court for the Northern District of Georgia, Rome Division, William R. Hicks was convicted of twelve (12) misdemeanors for the preparation, sale, and transportation of adulterated meat food products, in violation of the FMIA and the regulations promulgated thereunder.

CONCLUSION

By reason of the foregoing findings of fact, it is concluded that respondent is unfit, within the meaning of 21 U.S.C. § 671 and § 467, to engage in any business requiring federal meat or poultry inspection services, which should therefore be withdrawn from respondent, its owners, directors, successors, affiliates or assigns for a period of three (3) years.

Respondent and its president, William R. Hicks, were convicted of preparing frozen ground beef patties and "beef cubed steakettes" adulterated with added water which it sold and transported from respondent's plant in Wildwood, Georgia, to the Hamilton County Nursing Home of Chattanooga, Tennessee, in three separate shipments over the three month period of February through April 1981. Hicks was given a suspended sentence of 12 months in prison, placed on probation for 6 months and fined \$500.00; the respondent corporation was fined a total of \$3,000.00.

Although the crimes were misdemeanors, they were of the type that strikes at the very heart of the Federal Meat and Poultry Products Inspection Acts.

The Director of the Food Safety and Inspection Service's Compliance Division recommended withdrawal of inspection services for three years as the appropriate remedial deterrent. He explained that inasmuch as nothing deleterious had been added to the meat products, complainant therefore was not recommending permanent withdrawal of inspection. Permanent withdrawal of inspection has been the consistent recommendation, for example, in a whole series of cases involving convictions for bribing meat inspectors. The violations took place over a three month period, the amount of water added was substantial and Mr. Hicks was given every opportunity to present evidence showing mitigating circumstances to indicate that the recommended three year withdrawal of inspection services was inappropriate. He protested his innocence of the crimes for which he and his company were convicted, suggesting that his competitors had drummed up the charges, that he had been picked out as a target for prosecution, and that the chemical tests for added water were inconclusive.

He called a meat inspector employed by the State of Georgia who testified that he had found no violations by respondent involving economic adulteration of meat products during the three years he conducted random sampling on a monthly and, later, a weekly basis. The state inspector, however, was not necessarily at respondent's plant for a full day on each day he was present at respondent's plant, and his failure to discover such violations does not prove they did not occur.

Mr. Hicks also testified and recounted his good reputation in the industry and in his community, and his previous arrest-free record. He believed his plant employees who told him that they added no water or other additives to any of respondent's products. In his opinion, any problem with more water than allowed in a product labeled "ground beef" may have been the result of accidental mislabeling. During his testimony, he stated that respondent had surrendered its federal license and another firm was now operating the plant. He further advised that even when respondent had been operating the plant, withdrawal of federal meat and poultry inspection would have affected only 10 percent of its business, in that 90 percent did not require federal inspection.

Complainant has pointed out that unless an order of withdrawal is entered in this proceeding, respondent could resume full operation at any time. Furthermore, the lease arrangements respondent has made have aroused complainant's suspicions that it may be a sham disguising respondent's continued operations, and it requests that the order that is issued be broad enough to pierce through any such corporate device.

Upon consideration of all of these circumstances, the order requested by complainant appears fully warranted and shall be entered.

ORDER

It is hereby ordered that federal inspection services pursuant to the Federal Meat Inspection Act and the Poultry Products Inspection Act be and hereby are withdrawn for three (3) years from the effective date of this Order, from the respondent, its owners, officers, directors, successors, affiliates or assigns, directly or through any corporate or other device.

This Order shall become effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing these proceedings this Decision will become final without further proceedings a thirty five (35) days after service on respondent unless appealed to the Secretary by a party to the proceedings within thirty (30) days.

after service as provided in section 1.145 of the Rules of Practice (7 CFR § 1.45).

In Re: UTICA PACKING COMPANY, INC. FMIA Docket No. 35. Decided March 20, 1984.

Federal meat inspections services withdrawn and denied—Decision.

On November 18, 1982, Judicial Officer dismissed the original complaint "reluctantly." An order revoking the authority of the Judicial Officer was filed by the Secretary of Agriculture. Respondent argued that reconsideration should not be granted because complainant did not identify an error of law or fact in the Judicial Officer's decision on remand. It was found that complainant had presented reasonable and substantial argument and the Judicial Officer misconstrued the Court of Appeals Remand Order. Therefore, reconsideration was granted. Respondent was found unfit to receive federal meat inspection so long as a specified associate remained associated with the plant.

Marshall Marcus, for complainant.

James L. Quarles III, Washington, D.C., for respondent.

Decision by John Franke, Jr., Assistant Secretary for Administration.

**RULING ON COMPLAINANTS MOTION FOR RECONSIDERATION AND
DECISION AND ORDER ON RECONSIDERATION**

This matter is on remand from the United States District Court for the Eastern District of Michigan, Southern Division, to the Judicial Officer for consideration of evidence presented by the respondent in mitigation of its president's convictions under 18 U.S.C. 201(b) for bribing a federal meat inspector.

On November 18, 1982, the Judicial Officer issued a Decision and Order on Remand in which he "with great reluctance and misgiving" dismissed the complaint. Thereafter, complainant filed a motion for reconsideration and, almost simultaneously, the Secretary of Agriculture issued and filed in the record of the proceeding, an order revoking the authority of the Judicial Officer of this Department to perform any further regulatory functions in this case and vesting in me all his authority to perform further regulatory functions in the case. After a conference with counsel for the parties and disposition of a number of motions and requests, briefs and oral arguments were received relating to the question whether or not reconsideration be decided. I understand that issue to be whether the Judicial Officer correctly construed the order of the Court of Appeals for the Sixth Circuit directing the remand.

Respondent argues that reconsideration should not be granted because complainant has not identified an error of law or fact in the Judicial Officer's decision on remand. I think that complainant has presented reasonable and substantial argument that the Judicial Officer misconstrued the Court of Appeals remand order. Therefore reconsideration should be and is granted.

The Judicial Officer's Decision and Order on Remand contains a discussion of the background of the case, including a summary of the details of the felony conviction of David Fenster; his understanding of the order of the Court of Appeals; and a detailed description and evaluation of the mitigating evidence submitted by respondent. The Judicial Officer correctly points out in his discussion of the background of the case that

Consideration of the mitigating circumstances here is not for the same purpose as in a criminal proceeding, *viz.*, to determine whether punishment should be reduced. In fact, there is no punishment here. This is an administrative proceeding to protect the public interest, *i.e.*, to determine whether respondent is fit to receive meat inspection. The mitigating circumstances here are to be considered solely in determining whether they overcome the determination of unfitness that otherwise would be made based on the felony convictions involved in this case.

In his discussion of the import of the Court of Appeals order, the Judicial Officer stated "under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must nonetheless, be determined to be fit to continue to receive Federal meat inspection." He states further

Although [the Court of Appeals Order] suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201(b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

The Court of Appeals clearly held that mitigating circumstances are not immaterial or irrelevant and that the Judicial Officer erred in refusing to consider the mitigating evidence presented in this case. But it did not hold, even by implication, that there must be some set of mitigating circumstances which will outweigh a conviction of any felony. Indeed, the Court said "The more closely the conduct strikes to the policies of the Federal Meat Inspection Act,

the more likely it alone will support a determination of unfitness regardless of the mitigating facts present." All of this without once advertent to the strength of the evidence of mitigating circumstances. Finally, the Court unequivocally stated "This court expresses no opinion on either the mitigating circumstances or the merits of the action." Yet, despite the clear holdings and disclaimer quoted above, the Judicial Officer concluded that the Court's order implied that "some mitigating facts would outweigh a bribery conviction." I disagree. Indeed, for the Court to say, or imply, what the Judicial Officer inferred would have constituted the Court substituting its judgment for that of this Department. It is well established that a court may not do that. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Coastal Tank Lines, Inc. v. ICC*, 690 F.2d 537, 543 (6th Cir. 1982). I am unwilling to infer that the court intended to so intrude upon the Department's discretionary authority.

I therefore believe that the Judicial Officer should have decided the case as he clearly indicated he thought it should be decided in his Decision and Order on Remand at page 27: "Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant." He had at that point done all that the Court of Appeals order required him to do: considered the mitigating circumstances, considered how closely David Fenster's criminal conduct strikes to the policies of the Federal Meat Inspection Act, weighed the two against each other, and concluded that Utica is unfit to receive federal meat inspection while David Fenster is associated with it.

I further think that the order of the Court of Appeals, as I understand it, is correct and that in all cases under section 401 of the Federal Meat Inspection Act (21 U.S.C. 671), if mitigating evidence is proffered it must be received and must be considered by the adjudicating officials who decide the case.

After consideration of the entire record of this proceeding, I agree, except as indicated in the three preceding paragraphs, with the Judicial Officer's original decision and with his decision on remand. Specifically, I agree that the felony involved here strikes at the very heart of the Federal Meat Inspection Act program and I agree that, despite the mitigating circumstances presented by respondent, respondent is unfit to receive federal meat inspection so long as David Fenster is associated with the plant. I therefore agree generally with the order originally issued by the Judicial Officer on June 25, 1980. I think, however, considering all the circum-

stances of this case, that a longer period of time should be allowed for David Fenster to dissociate himself from Utica.

ORDER

Inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) is indefinitely withdrawn from and denied to respondent, its officers, directors, successors, and assigns, directly or through any corporate or other device.

Provided, however, That such a withdrawal and denial of inspection shall be suspended for so long as David Fenster is not associated with respondent, its successors, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder or employee, and for so long as David Fenster provides no direction or advice to and exercises no control over respondent; its successors or assigns, directly or through any corporate or other device;

Provided further, That David Fenster shall be permitted to be associated with the respondent firm for one year subsequent to the date this order becomes final and shall have one year subsequent to the date this order becomes final to dispose of his stock;

And provided further, That if it is determined, after opportunity for a hearing under the Federal Meat Inspection Act, that any terms of the above provision has not been or is not being complied with, the suspension will be terminated and the withdrawal or denial provisions of this order will become effective immediately.

This order shall become final and effective upon service upon the respondent.

[The Decision and Order on Reinand referred to above is printed in January February 1985 issue of Agricultural Decision.—Ed]

In Re: RIVERVIEW ABBATOIR and MEAT PACKING Co., INC. and Two COUNTRIES CITY DRESSED ABBATOIR PACKING CORP. FMIA Docket Nos. 72 and 73. Decided March 30, 1984.

Michael Weaner, for complainant.

Raymond Majewski, South Plainfield, New Jersey, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

ORDER DISMISSING RIVERVIEW ABBATOIR AND MEAT PACKING CO. INC.

The captioned matters were consolidated for trial in accordance with agreements reached during a telephonic pretrial conference.

Notice of Hearing and Pretrial Conference Summary filed January 16, 1984.

Thereafter, in accordance with an agreement among counsel, there has been a substitution of counsel in FMIA Docket No. 72, *In re Riverview Abbatoir and Meat Packing Company, Inc.*

Counsel for Riverview Abbatoir and Meat Packing Company, Inc., FMIA docket No. 72 has withdrawn the request of Riverview Abbatoir and Meat Packing Company, Inc. for Federal Meat and Inspection Services.

Counsel for Complainant now files a motion to sever the Riverview Abbatoir and Meat Packing Company, Inc., FMIA Docket No. 72 case from the consolidation of the cases and a motion to dismiss the Complaint against Respondent Riverview Abbatoir and Meat Packing Company, Inc., FMIA Docket No. 72, based on withdrawal of that Respondent's application for meat inspection services.

IT SHOULD BE AND HEREBY IS ORDERED that the Complaint against *Riverview Abbatoir and Meat Packing Co., Inc.*, FMIA Docket No. 72 is dismissed.

Further, trial in *In re: Two Countries City Dressed Abbatoir Packing Corp.*, FMIA Docket No. 73 will begin at 9:30 a.m., April 25, 1984, in Courtroom 637, Superior Court, 6th Floor, New Courthouse Building, 77 Hamilton Street, Paterson, New Jersey 07505 as previously scheduled.

*In Re: R.F. BURGIN, JR. and GARY EDWARDS. HPA Docket No. 185.
Decided February 29, 1984.*

Showing sores horse—Consent.

Gary Shockley, for complainant.

David Byrne, Jr., for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENT GARY EDWARDS

This is a proceeding under the Horse Protection Act, as amended, 15 U.S.C. §§ 1821-31 (1976). A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice, 7 CFR §§ 1.133(b)(1), 1.135 (1983), was served upon respondent Gary Edwards. This decision is entered pursuant to the consent decision provision of the Rules of Practice, 7 CFR § 1.138.

Respondent Gary Edwards admits the jurisdiction of the Secretary of Agriculture in this matter and waives hearing and further procedure herein. Mr. Edwards and the complainant consent to the issuance of this decision for the purpose of settling this matter.

FINDINGS OF FACT

1. Gary Edwards is an individual residing at Route 4, Dawson, Georgia 31742. He was at all times material herein the trainer of the horse known as "Front Page Copy."

2. On or about August 16, 1979, respondent Edwards transported to the International Championship Walking Horse Show, Murfreesboro, Tennessee, and entered for the purpose of showing and exhibiting, and showed and exhibited, the horse "Front Page Copy" as entry 886 in Class No. 13.

3. In the opinions of examining veterinarians employed by the U.S. Department of Agriculture, the horse was sore when exhibited on August 16, 1979, as set forth in paragraph 2, above.

4. Respondent Edwards denies that the horse was sore on August 16, 1979, and disclaims any liability in this matter.

CONCLUSIONS

Respondent's admission of jurisdiction and his agreement with complainant as to the issuance of this decision warrant the entry of such decision in this matter.

ORDER

Respondent Edwards is assessed a civil penalty of \$1,000 in accordance with the Act, 15 U.S.C. § 1825(b)(1). This penalty shall be

due thirty (30) days after service of this order on respondent Edwards.

Further, respondent Edwards will cease and desist from violating any and all provisions of the Horse Protection Act, 15 U.S.C. §§ 1821-31, and the regulations issued thereunder, 9 CFR §§ 11.1-.41 (1983).

This order shall have the same force and effect as if entered after a full hearing. It shall be final upon issuance and effective in accordance with its terms.

COURT DECISIONS

In the UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, LEON FARROW, an individual, KNOKE LIVESTOCK BUYERS, INC., a corporation, and THOMAS LENZ an individual *v.* UNITED STATES DEPARTMENT OF AGRICULTURE, JOHN R. BLOCK, Secretary, No. 83-2548. Decided April 24, 1985. Honorable Thomas E. Fairchild, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, setting by designation.

This case is before us on a petition for review of a decision and order of the Judicial Officer (JO) of the Secretary of the United States Department of Agriculture finding petitioners in violation of § 312(a) of the Packers and Stockyards Act, 7 U.S.C. § 213(a), and implementing Regulation 9 CFR § 201.70 (1984). The order required petitioners to cease and desist from described practices and suspended them as registrants under the Act for a period of forty-five days.¹

Petitioners Leon Farrow and Knoke Livestock Buyers, Inc., are registered dealers under the Act authorized to buy and sell livestock in commerce; Thomas Lenz manages Knoke Livestock and is its principal stockholder.²

The present dispute centers around the sale of "pound cows" at the Algona Livestock Auction and Exchange in Algona, Iowa.³ Knoke Livestock and Farrow are regular buyers at the Algona market. The purchase of pound cows is only a small part of their businesses.

On April 7, 1981, an officer of the Department of Agriculture filed an administrative complaint against petitioners. The complaint alleged that petitioners willfully violated 7 U.S.C. § 213(a) and Regulation 9 CFR 201.70 by entering into and carrying out an agreement not to compete against each other in the purchase of pound cows at the Algona market in early 1980. In substance, petitioners claimed that their arrangement was aimed at saving transportation costs on pound cows. Joint trucking of pound cows for the 150 miles to the slaughterhouse would be far more economical.

Section 312(a) of the Packers and Stockyards Act makes it unlawful for any dealer to engage in or use any unfair practice in connection with the buying of livestock. 7 U.S.C. § 213(a). Regulation 201.70, one of the regulations promulgated by the Department to define unfair or deceptive practices under the act, provides:

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operations in competition with, and independently of, other packers and dealers similarly engaged.

9 CFR § 201.70 (1984).⁴

After hearing, the ALJ found that the agreement between Knoke and Farrow was an accommodation for transportation, was not for the purpose of controlling prices or lessening competition in the purchase of pound cows, and did not have that effect. The ALJ concluded that no violation had been shown and dismissed the complaint.

The agency appealed the ALJ's decision to the JO. See 5 U.S.C. §§ 556, 557; 7 CFR § 2.35 (1984). The JO found that Knoke and Farrow had been the principal buyers of pound cows at Algona, but had "entered into an agreement that (i) . . . Farrow would buy the pound cows at Algona when he was present, (ii) . . . Knoke would refrain from buying pound cows at Algona when . . . Farrow was present, and (iii) [Knoke and Farrow] would share the profits on the pound cows." Concluding that the agreement and conduct under it constituted an unfair practice under § 213(a), (as well as a violation of 9 CFR § 201.70) he issued a cease and desist order.

Characterizing the violation as "intentional, flagrant, and serious" as well as "wilful" he suspended Farrow and Knoke as registrants for forty-five days, a sanction he characterized as "severe," and which petitioners say could bankrupt them.

The findings of the Secretary of Agriculture (here the JO) must be sustained by this court if supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison v. Labor Board*, 305 U.S. 197, 229 (1938)). See also *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983); *Western Iowa Farms Co. v. United States*, 629 F.2d 502, 504-05 (8th Cir. 1980); *Corona Livestock v. U.S. Dept. of Agriculture*, 607 F.2d 811 (9th Cir. 1979). This substantial evidence standard is not rendered inapplicable when the JO and ALJ disagree. The JO, sitting in review of ALJ's initial decision, is authorized by statute "to substitute its judgment for that of the ALJ." *Mattes*, 721 F.2d at 1129.

We have little difficulty concluding that there was sufficient evidence to support the JO's finding that Knoke and Farrow made an

⁴ As stated in the Department's brief: While these regulations have been interpreted as purely advisory, so that a violation of the regulations is insufficient to prove a violation of the Act, they nonetheless serve to give notice of the Secretary's interpretation of what constitutes an unfair practice and should be given great weight. *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022-23, (8th Cir. 1932).

See also reference to "advisory" regulations in *Central Coast Heats v. U.S. Dept. of Agriculture*, 541 F.2d 1325, 1326 (9th cir. 1976).

agreement with the terms he described. We agree that an effect of such an agreement was that Knoke and Farrow would not bid competitively in purchasing pound cows at Algona, although they had previously done so. The analysis of their purchases of pound cows at the sales from March 3 to July 21, 1980 showed a uniform pattern, with one negligible exception. There were 19 sales during this period. Farrow was present and bought pound cows at each of 15 of them. His purchases ranged from four to 39. Knoke bought only one pound cow at one of the 15 sales (April 21) and none at any of the rest. A Knoke representative was present at all these sales. Farrow's records for three sales in March and three in June showed that the cows he purchased were trucked to a packer at Omaha, and he remitted half the profit to Knoke. Farrow was not present at four of the 19 sales. At those four Knoke bought pound cows, ranging in number from four to 32. There was testimony of observers, and evidence of admission indicating that they did not bid against each other for pound cows. It could be readily inferred from the circumstances that they agreed that one or the other would buy for the account of both, and that profits would be split. It is highly improbable that this pattern would have been evident without agreement. As a result of this evidence, we must accept the JO's finding of an agreement which resulted in their not bidding against each other for pound cows.

The record does not show the total number of pound cows sold at each Algona sale, but the ordinary range is between 15 and 45. Although there were three other dealers who bought, there is evidence to support the JO's finding that Knoke and Farrow were the principal buyers of pound cows at Algona. We can agree with the JO that elimination of one of the principal buyers as an active bidder tended to reduce competition at the Algona sales and, as a result, created a likelihood that the prices at which the cows were purchased would be reduced.

There was testimony of observers that the price paid at Algona for pound cows during this period was the top, best, and fair price. The ALJ, who saw and heard the witnesses, credited this testimony. The JO conceded that there was no direct evidence that prices were adversely affected, but wrote that he drew the inference that they were.

We agree with the JO that a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act, and be a predicate for a cease and desist order. We conclude that this is so even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result.

Seven U.S.C. § 213(a) and 7 U.S.C. § 192(a), which deals with the behavior of packers and poultry dealers and handlers, authorize the Secretary of Agriculture to regulate anticompetitive trade practices in the livestock and meat industry in accord with "the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the Fair Trade Commission Act." *De Jong Packing Co. v. U.S. Dept. of Agriculture*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980).

These provisions have been liberally construed so as to give effect to the remedial purposes of the Packers and Stockyards Act. See, e.g., *Central Coast Meats v. U.S. Dept. of Agriculture*, 541 F.2d 1325, 1328 (9th Cir. 1976) (Goodwin, J., dissenting); *Armour and Company v. United States*, 402 F.2d 712, 722 (7th Cir. 1968); *Swift & Company v. United States*, 398 F.2d 247, 253 (7th Cir. 1968). This reading is consistent with this court's observation in *Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980), that the Packers and Stockyards Act "should be broadly construed to give the Secretary of Agriculture the authority to deal with any practices that inhibit the fair trading of livestock by stockyards, market agencies, and dealers." *Id.* at 590. See also *Bruhn's Freezer Meats v. United States Dept. of Agr.*, 438 F.2d 1332 (8th Cir. 1971).

A practice is "unfair" under § 213(a) if it injures or is likely to injure competition. *De Jong Packing*, 618 F.2d at 1336-37, and cases cited therein. The JO concluded that petitioners' agreement to combine in bidding on pound cows injured or was likely to injure competition for pound cows at the Algona market.

The potential anticompetitive effect of collusive bidding arrangements has been recognized in cases arising under 7 U.S.C. §§ 192(a) and 213(a). In *Berigan v. United States*, 257 F.2d 852 (8th Cir. 1958), this circuit upheld a JO's finding that a "turn system," in which dealers flipped coins for the right to bid on cattle, was an unreasonable restraint on competition in violation of § 213(a). The turn system determined the order in which bids would be received and limited the number of bidders to three. The court concluded this system deprived producers and consumers of free competition, creating the potential for dealers to collude on price. *Id.* at 859. See also *Aikins v. United States*, 282 F.2d 53 (10th Cir. 1960) (finding turn system in violation of § 213(a) because it limited the number of prospective buyers). Other bidding arrangements have been found anticompetitive by the Seventh Circuit. In *Swift & Company v. United States*, 398 F.2d 247 (7th Cir. 1968), two meat packing companies with buyers in a local lamb market were found to have agreed to refrain from bidding against the area's principal dealer in violation of Regulation 201.70 and § 192(a). The Seventh Circuit

concluded that the action of the packers might be characterized as a simple refusal to deal (with lamb producers), conduct permitted by the Sherman Act. *Id.* at 253. Nevertheless, the court upheld the JO's finding of a violation. The court found "[t]he lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed." *Id.* at 254. The Seventh Circuit reached a similar conclusion earlier. See *Swift & Company v. United States*, 308 F.2d 849 (7th Cir. 1962). In that case Swift and another hog buyer, who had been in competition, agreed to bid on a buy together all top grade hogs sold at a local market. The court concluded the "essential nature and the necessary result of this arrangement or practice was to eliminate competition." *Id.* at 853.

Petitioners attempt to distinguish these bidding arrangements from the agreement at issue, pointing out that in the two *Swift* decisions there was at least some evidence of an actual depression of the price paid for stock. Here, they argue, the agency made no showing that the price for pound cows was actually depressed by the agreement. Indeed, petitioners point out that two livestock dealers familiar with the Algona market and the owner of the market testified the prices were competitive with other cattle markets during the first half of 1980 when the agreement was in effect. The ALJ relied on this testimony to find the agreement had no impact on price.

The Packers and Stockyards Act does not require that the Secretary prove actual injury before a practice may be found unfair. "[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered," *De Jong*, 618 F.2d at 1336-37. See also *Swift & Company*, 393 F.2d at 253; *Armour and Company v. United States*, 402 F.2d 712, 723 n.12 (7th Cir. 1968). Cf. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (FTC has power "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of . . . other provisions of the antitrust laws"). Accordingly, the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation.

Petitioners rely on *Corona Livestock v. U.S. Dept. of Agriculture*, 607 F.2d 811 (9th Cir. 1979) and *Central Coast Meats v. U.S. Dept. of Agriculture*, 541 F.2d 1325 (9th Cir. 1976). In those cases the Ninth Circuit reversed JO orders. The practices considered were quite different and the court concluded, ultimately, that there was no sufficient showing that producers were likely to be injured by them. Here the two regular, principal buyers in a market, though small, who had bid competitively for animals of a particular class,

made an agreement which resulted thereafter in one of them bidding for both.

Amicus Livestock Marketing Association suggests that the Packers and Stockyards Act of 1921 was never intended strictly to regulate the conduct of dealers but rather to control the anticompetitive practices of the then five major meatpackers in the United States. This, it suggests, explains why the competitive practices of packers and dealers are regulated under distinct sections of the Act. *Amicus* appears to argue that it is therefore appropriate to require the Secretary to make a greater showing of anticompetitive effect in the case of an agreement limiting competition by small, regional dealers under § 213(a) than in the case of large, national packers under § 192(a). We are unpersuaded.

Petitioners were faced by a problem of escalating trucking costs. Pound cows at Algona were few in number. They could be sold only for slaughter and the packer was 140 to 150 miles away, in Omaha. The cost of trucking had come to be \$1.80 per mile, or about \$270 per truck trip. Petitioners could save costs by combining cows for shipments. Savings costs would produce a margin which would at least make it possible for them to pay better prices. Unfortunately they chose a solution which left the buying to one of them although both shared the profit. This can be found to endanger competition. A different solution might have been worked out, not involving bidding by only one for the benefit of both.

There was no evidence that the method was selected for the purpose of buying cows for less money, nor that it had that effect. The ALJ was satisfied that petitioners' relationship was an accommodation for transportation and in fact had no material effect on the prices paid for cows. In evaluating evidence in order to determine whether there is substantial evidence to support the JO's decision, we give appropriate consideration to the different conclusions reached by the ALJ who saw and heard the witnesses. See *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 496 (1951).

We sustain the JO's cease and desist order on the basis that petitioners' agreement and practice posed a danger of reduction of prices to farmers, resulting from a diminution of competition. We do not sustain any finding that petitioners intended to cause a prior reduction by this practice or that prices were reduced.

Petitioners contend that suspension of their entire operations for forty-five days would be fatal to their businesses. The JO acknowledged that his order is a "severe" sanction. He considered it justified under Department policy because the violations were "intentional, flagrant, and serious" and because petitioners must have known that their agreement was unlawful.

The record contains no support for deeming the violations intentional, flagrant, or serious, or that petitioners were aware of unlawfulness.

We are mindful that nothing in 7 U.S.C. § 204, authorizing suspensions, "confines its application to cases of 'intentional and flagrant conduct' or denies its application in cases of negligent or careless violations." *Butz v. Clover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). *Butz* was a case where the suspension order was based on violations committed in disregard of previous warnings, not present here. The Supreme Court also expressed doubt as to this court's premise that the Secretary's practice was to impose suspensions only in cases of intentional and flagrant conduct.

Here, however, the JO's decision indicates that under Department policy the admittedly severe order is predicated on the violation being flagrant and serious.

Although we think it the sounder view that the agreement between the two principal buyers at a small sale can be deemed an unfair practice, we have found no case on all fours. We acknowledge that a different view of this matter is at least plausible. The ALJ concluded there was no violation.

We cannot sustain the JO's view that petitioners must have known their agreement was unlawful.

Accordingly, we affirm the part of the order which commands petitioners to cease and desist from conduct, but set aside that part which suspends them as registrants. No party shall recover costs in this court.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA—DEAN ROWSE and HELEN ROUSE v. PLATTE VALLEY LIVESTOCK INC. CV 84-L-227.

MEMORANDUM ON DECISION

Trial was had December 11, 1984, on the plaintiffs' complaint to enforce a reparations order issued in their behalf by the Secretary of Agriculture under § 309 of the Packers and Stockyards Act of 1921, as amended (codified as 7 U.S.C. § 210). Evidence was taken on both the count seeking enforcement of the order and on a second count seeking damages for interest paid by the plaintiffs on a loan they procured to replace the capital lost in the bad-check transaction underlying the reparations count.

The basic facts and history of the case have been stated previously, see Memorandum and Order on Motion for Summary Judgment

and Motion to Dismiss (Nov. 2, 1984), filing 23, and need not be repeated. In that memorandum I found that the Secretary and this court had subject matter jurisdiction because the alleged activity of the defendant constituted a "practice" under 7 U.S.C. § 208(a). Now the legal issue in the first count concerns whether the defendant's "practice" was "unjust, unreasonable, or discriminatory" under § 208(a).

The preliminary question is whether there is substantial evidence on the administrative record to support the Secretary's findings. *Rice v. Wilcox*, 630 F.2d 586, 591 (8th Cir. 1980); 5 U.S.C. § 706(2)(E). If so, then "the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated." 7 U.S.C. § 210(f). If not, then the Secretary's order is inadmissible. *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 396, 315 N.W.2d 229, 236 (1982). Under the prima facie evidence standard, the defendant may introduce evidence to rebut the prima facie effect of the order. *Id.*; cf. *ICC v. Atlantic Coast Line Railroad Co.*, 383 U.S. 576, 594 (1966) (interpreting similar provision of Interstate Commerce Act, § 16(2)).

Having examined the administrative record, including the hearing transcript, I find there to be substantial evidence to support at least those of the Secretary's findings of fact that establish a violation of § 208. Therefore, pursuant to § 210(f), the plaintiffs have sustained their burden of going forward with the evidence, assuming the correctness of the Secretary's interpretation of the law, the second question in the present inquiry.

While the Secretary's findings of law must be reviewed *de novo*, *Rice*, 630 F.2d at 589; 5 U.S.C. § 706, it is a tenet of judicial review of administrative decisions that "[w]hen faced with a problem of statutory construction" courts are bound to give "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1964). This principle applies to the problem of fleshing out the meaning of the § 208 prohibition of "every unjust, unreasonable, or discriminatory regulation or practice" with respect to the furnishing of stockyard services. *Hays Livestock Commission Co. v. Maly Livestock Commission Co.*, 498 F.2d 925, 930 (10th Cir. 1974); *United States v. Donahue Brothers*, 59 F.2d 1019 (8th Cir. 1932). The Secretary's interpretation of the facts, to the effect that the defendant engaged in an unjust and unreasonable practice violative of § 208, is to be accorded great deference if the factual findings are supported by substantial evidence. *Id.* at 931; *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978). As the court noted in *Hays Livestock*, this level of deference arises because the statute fails to define the

critical phrase, leaving its meaning to "be determined by the facts of each case within the purposes of the Packers and Stockyards Act," and because "the responsibility for efficient regulation of market agencies and packers lies with the Secretary of Agriculture. . . ." 498 F.2d at 930 (quoting *Capitol Packing Co. v. United States*, 350 F.2d 67, 72, 76 (10th Cir. 1965)).

Several sections of the Nebraska Uniform Commercial Code clarify the legal rights of the parties: the Rowses; Ken Kaba, the buyer; and the defendant, Platte Valley, the consignment seller. "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." Neb. Rev. Stat. UCC § 2-507(2) (Reissue 1980). "[P]ayment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." UCC § 2-511(3).

(1) . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

* * * * *

(b) the delivery was in exchange for a check which is later dishonored, or

* * * * *

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant for purposes of sale who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

UCC § 2-403

Under this rules, the Rowses had the right to recover the cattle when they discovered that Kaba's check had been dishonored. *Peck v. Augustin Brothers Co.*, 203 Neb. 574, 279 N.W.2d 397 (1979); see J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 3-6, at 115 (2d ed. 1980). The fact that after their dishonor Dean Rowse allowed Kaba a short time to make good the checks did not change the rights between the Rowses and Kaba, retroactively alter the state of title, or turn the sale into a credit transaction. By the time the Rowses learned of the dishonor, the cattle had been sold on consignment by Platte Valley for

Kaba's account, and the various purchasers obtained good title even though Kaba's title was only conditionally valid at the time of the auction sale and even though the condition failed. As an agent for Kaba, selling on commission, Platte Valley's rights could rise no higher than those of its principal. *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 395, 315 N.W.2d 229, 236 (1982). As against the Rowses, neither Kaba nor his agent was entitled to the proceeds, because Kaba's rights were only conditional until the checks cleared. However, at the time of the sale and disposition of proceeds Kaba's checks had not yet been dishonored. Therefore, no conversion action would lie under state law, at least as to the portion of the proceeds sent to Dale Van Wyk, because the Rowses did not then have an immediate right to possession. *Allen v. Dealer Assistance, Inc.*, 207 Neb. 455, 299 N.W.2d 744 (1980).

Whether Platte Valley's distribution of the sale proceeds to itself and Dale Van Wyk, a creditor of Kaba, or its retention of the portion of the proceeds it kept to offset Kaba's debt to it, after the Rowses' possessory interest was revived or after the Rowses demanded the money, would be actionable under state conversion law is relevant here only to the extent that the question casts light on what an unjust practice is under the federal law—the plaintiff's suit based on the federal law rather than any state law.

Regardless of the legality of Platte Valley's original distribution of the proceeds, its retention of a portion after being informed of the Rowses' claim was unjustified. At that point Platte Valley's president, Gene Lenhart, knew that the Rowses had not been paid and that they were the true owners of the cattle, as between them and Kaba, rendering ineffective Kaba's oral approval of Platte Valley's distribution of the proceeds. Platte Valley should have paid to the Rowses the portion of the proceeds still in its hands once Lenart learned the full facts, as it had done for the Rezac Brothers after the Rezacs complained that Kaba had not paid them for cattle he purchased from them and sold through Platte Valley.

The proceeds from the cattle sale were trust funds in Platte Valley's hands. 9 CFR § 201.42. A trustee may not offset a debt owing to the trustee individually and not as trustee. *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 394, 315 N.W.2d 229, 235 (1982). The conversion or commingling of trust funds is an unjust practice under the Packers and Stockyards Act. *United States v. Donahue Brothers*, 59 F.2d 1019 (8th Cir. 1932).

The majority rule at common law is that an auctioneer who sells goods on behalf of a principal who lacks valid title, or who holds it subject to a mortgage or other lien, or who for other reasons has no

right to dispose of it, is liable to the true owner, lien holder, or conditional vendor for conversion, despite the auctioneer's good faith and lack of knowledge of the competing interest. *Annot.*, 96 A.L.R.2d 208, 210 (1964). The Nebraska Supreme Court adopted the majority rule in *State Securities Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961). The state legislature responded by enacting Neb. Rev. Stat. § 69-109.01, which exempts from liability an auctioneer who in good faith and without notice of a "security interest" sells personal property at auction for a principal whose identity has been disclosed, if the auctioneer has no interest and only acts as an intermediary of the owner. The statute did not abrogate the common law rule, but only provided an exemption if the statutory conditions are met. *State Securities Co. v. Norfolk Livestock Sales Co.*, 187 Neb. 446, 449, 191 N.W.2d 614, 617 (1971) (also holding that the Packers and Livestock Act did not exempt livestock auctioneers from liability for conversion under *Svoboda*).

The Secretary found that the defendant "did not, so far as the records shows, make the disclosure of the principal's identity required by" § 69-109.01. As the court held in *Norfolk Livestock Sales*, disclosure must be made by some form of public announcement prior to the sale, and simple notation on documents open to public inspection does not suffice. At trial Lenhart testified that at the auction he did announce Kaba's name as the seller of the cows. Even if this is sufficient to rebut the Secretary's finding on that point, the Rowses, as the Secretary observed, were defrauded cash sellers upon the dishonor of the checks, not holders of a security interest. The right to reclaim created by UCC § 2-507(2) "is a right to undo the transaction, not a right to 'secure' payment of the price as required by the definition of 'security interest' " under UCC § 1-201(37). *Guy Martin Buick, Inc. v. Colorado Springs National Bank*, 519 P.2d 354, 359 (1974) (en banc); cf. *In re Mel Golde Shoes, Inc.*, 403 F.2d 658 (6th Cir. 1968) (seller's right to reclaim goods from insolvent buyer under UCC § 2-702(2) is not a "security interest"). Therefore, Neb. Rev. Stat. § 69-109.01 does not override the *Svoboda* rule concerning an auctioneer's liability to the true owner notwithstanding lack of actual notice of the competing claim.

Under the regulations promulgated by authority of 7 U.S.C. § 228(a), a market agency may not pay the net proceeds from a consignment sale to anyone other than the consignor or shipper unless "(1) such market agency has reason to believe that such person is the owner of the livestock, (2) such person holds a valid, unsatisfied mortgage or lien upon the particular livestock, or (3) such person holds a written order authorizing such payment executed by the owner at the time of or immediately following the consignment of

such livestock. . . ." 9 CFR § 201.39(a). Neither recipient of the net proceeds from the sale of the Rowse cattle was the owner or a mortgage or lien holder with respect to those 108 cows. Though Kaba obtained oral permission from Kaba, the apparent owner, he knew that Kaba had recently failed to pay for cattle he had purchased from three others, including Platte Valley itself.

Platte Valley argues that Lenhart could not have been expected to discover the Rowses' continued interest in the cattle at the time of the auction sale or distribution of proceeds. It is true that on February 28 the checks had not yet bounced and that no one, except perhaps Kaba and his bank, knew that they might. Also, all of the specific information that Lenhart had about the Rowse cattle was consistent with the idea that Kaba had paid for them. However, in light of what he knew about Kaba's recent failures to pay for cattle, Lenhart should have asked Kaba if the Rowses had been paid. Nothing in the record indicates that such an inquiry would have been fruitless. Had Kaba told Lenhart that the cattle proceeds were necessary to make the checks good, Platte Valley should have paid them either to Kaba, so that the checks would be covered, or directly to the Rowses, either of which would have been allowed by the regulation quoted above. Had Kaba assured Lenhart that there was no problem with the payment to the Rowses, then Platte Valley could not be charged with knowledge of the flaw in Kaba's title.

In the cases most closely analogous to the present suit, the market agencies actually knew before they offset the proceeds that the cattle sellers had not been paid by the consignors. *E.g., Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980); *Mid-South Order Buyers*. However, in *Rice* the hearing officer had noted that it was an unjust practice for the market agency to retain the proceeds in payment of the consignor's debts owed to it with knowledge that the consignor had not paid the owner, or "with timely notice of sufficient facts to cause a reasonably prudent person to make a further investigation to ascertain whether there was an adverse interest in the cattle." 630 F.2d at 588 n.2. The Secretary reiterated that interpretation of the statute in the present case.

Aside from the rule that the Secretary's interpretation is entitled to great weight, the view that actual knowledge on the part of the market agency is not necessary for a violation of § 208 is supported by the policies behind the Act. One purpose of the Act is "to protect the owner and shipper of livestock, and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his prod-

uct." *United States v. Donahue Brothers*, 59 F.2d 1019, 1023 (8th Cir. 1932); accord *Mid-South Order Buyers*, 210 Neb. at 394, 315 N.W.2d at 235 ("One of the apparent purposes of this regulation is to prevent the market agency from using the trust account to finance its own operations. Concomitant with that purpose is the objective of assuring that the seller of the cattle is paid."). The offset of a debt unrelated to the transaction and the payment of sale proceeds to one of the market agency's president's friends, who had become a creditor of the consignor in an unrelated transaction, were exercises of dominion over the proceeds that were inconsistent with the agency's limited roles as the auctioneer of the cattle and the trustee of the proceeds. The Secretary's interpretation of the disbursement regulation limits the agency's power to make decisions about who is entitled to proceeds, leaving those decisions instead in the hands of those in a better position to know the relevant facts. It promotes stability and certainty in the marketing of livestock by eliminating the ability of the market agency to favor some of the consignor's creditors, including itself, over others, and by restricting the payment of the proceeds to those directly involved with the cattle from whose sale they arose. Under this view, when the market agency puts on judicial robes to weigh the competing claims of the consignor's creditors, it assumes the risk of personal liability if it chooses to make a payment not authorized by the regulation and it turns out that payment according to the regulation was necessary to pay the seller.

The fact that Kaba orally authorized the payment does not change the outcome. First, his right to dispose of either the cattle or the proceeds was conditional upon his check being honored. When the payment failed, and the Rowses' right to reclaim arose, Kaba's authorization became voidable, and was indeed voided when the Rowses claimed the proceeds. Second, it was not "a written order authorizing such payment executed by the owner." 9 CFR § 201.39(a)(3). It was not written, and Kaba was only the conditional owner. Third, as the Secretary found, Lenhart was not entitled to rely on Kaba's authorization, in light of what he knew about Kaba's recent financial dealings, without inquiring into whether the proceeds were needed to pay for the cattle. Deference to the Secretary's interpretation of the duties of market agencies vis-a-vis cattle sellers is appropriate on this point.

The evidence presented at trial by the defendant to rebut the plaintiff's prima facie case does not change the legal result. The evidence reinforces the fact that Lenhart did not actually know that the Rowses had been paid, but it also reiterates that Lenhart did not inquire of Kaba about whether the Rowses had

been paid, although he knew that Kaba had failed to pay for cattle on three other recent occasions. The evidence shows that the proceeds from the sale of the Rowse cattle were not disbursed until after Lenhart obtained oral permission from Kaba and it raises a question as to whether Lenhart told Kaba what would happen to the proceeds before he asked his approval or asked him first; however, given the view I have taken of the law and the weight I have accorded the Secretary's interpretation of the market agency's duties, it would make no difference even if I were to take Lenhart's testimony as true on every point.

Therefore, to the extent that it finds the defendant liable for the gross proceeds of the sale of the Rowse cattle, the reparations award is supported by substantial evidence and is based on a correct interpretation of the law, and the defendant has failed to rebut the plaintiff's prima facie case.

Two questions remain: First, is the reparations order's award of prejudgment interest authorized by law? Second, does the court have jurisdiction to award the plaintiffs damages for actual interest expenses, though the reparations award did not do so, and, if it does, have the plaintiffs proven their entitlement to such damages?

The underlying obligation of the defendant arose from federal law, so federal law applies to the question of damages. *Cf. Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456, 457 (1957); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *United States v. Bass*, 215 F.2d 9, 15 (8th Cir. 1954). In the absence of a federal statute allowing or barring recovery of interest, it is for the federal courts to determine the appropriate measure of damages, including interest, for non-payment of the amount found to be due. *Royal Indemnity Co. v. United States*, 313 U.S. 289, 296 (1941). The courts fashion rules granting or denying prejudgment interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principles of damages. *Rodgers v. United States*, 332 U.S. 371, 373 (1947).

[A] persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

Id. The award of interest is discretionary with the court and turns on considerations of practical justice and fairness rather than a rigid theory of compensation. *Bass*, 215 F.2d at 14, 15. It is not necessarily a bar to the allowance of interest that a claim has not been liquidated. *Id.* at 15. In approving an interest award by the Interstate Commerce Commission in *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 240 (1925), the Court said, "The mere fact that the validity of the claim is disputed and that the amount recoverable is uncertain obviously does not bar the recovery of interest." Nebraska's restrictive rules on liquidation do not control the availability of prejudgment interest under either the Interstate Commerce Act or the Packers and Stockyards Act.

One purpose of prejudgment interest is to "help[] compensate plaintiffs for the true cost of money damages they have incurred." *General Facilities v. National Marine Service, Inc.*, 664 F.2d 672, 673 (8th Cir. 1981). "[E]quitably, particularly in these days of high interest rates, the wronged party should ordinarily collect prejudgment interest where the damages can be computed with reasonable precision." *Nebraska Public Power District v. Borg-Warner Corp.*, 621 F.2d 282, 287 n.10 (8th Cir. 1980). Courts interpreting the same statutory language at issue here—"shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation," compare 7 U.S.C. § 209(a) with former 49 U.S.C. § 8 (repealed 1978))—have long approved of the Interstate Commerce Commission's policy of awarding interest on reparations orders from the date of exaction of excessive freight charges. *E.g.*, *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Missouri Pacific Railway Co. v. C.E. Ferguson Sawmill Co.*, 235 F.2d 474 (8th Cir. 1916). In the present case, the Secretary awarded prejudgment interest at a 11 percent rate, apparently pursuant to a policy published at 45 Fed. Reg. 37872 (June 5, 1980) (changing the long-standing rate of 8 percent).

The award of prejudgment interest on at least some part of the reparations award pursuant to Department of Agriculture policy was legal. I shall address later the question of whether interest is appropriate on all of the award. The inquiry now turns to the claim for actual interest expenses.

The plaintiffs' second cause of action is based on evidence presented at trial that the Rowses wrote a check to the First National Bank of Atkinson, in reliance on the validity of the Kaba checks, to pay off part of their indebtedness to the bank; that the Rowses' account contained insufficient funds to cover their check to the bank.

once it became known that Kaba's checks, which they had deposited in their account, had been dishonored; that the Rowses took out a new loan for \$58,000 to replace the funds represented by Kaba's checks and to cover their check to the bank; that the replacement loan has been refinanced subsequently, but remains unpaid; and that the Rowses have incurred substantial interest expenses under the replacement loan at rates varying from 13¾ to 17½ percent. As of the date of trial, the unpaid balance of principal and interest was \$117,067.75, and interest was accruing at the rate of \$41.41 per day.

According to the administrative record, the facts concerning the making of the replacement loan and its amount were brought out on cross-examination of a bank officer during his deposition, but no evidence was elicited concerning the interest paid on that loan. The reparations complaint before the Secretary sought the amount of the net sales proceeds from the auction of the Rowse cattle "plus daily interest thereon from February 27, 1980, forward," but did not allege the existence of the replacement loan or seek damages for the interest incurred on that loan. The plaintiffs' briefs to the Secretary, filed approximately two years after the replacement loan was taken out, did not mention that loan or seek damages for interest actually paid as a result of the defendant's violation of the Act; instead, the only reference to interest was a plea in the summary of the reply brief for the net sales proceeds and the commission, "and with interest on this total amount at the rate of at least 12% from February 27, 1980, forward," without mentioning the authority for the 12 percent rate. The reparations order mentioned the execution of the promissory note to the Rowses' bank after Kaba's checks bounced, but made no mention of interest incurred on that loan. Instead, the Secretary, without explanation, included in the order an award of interest at the rate of 13 percent from April 1, 1980, until paid. The apparent basis of the interest award was 45 Fed. Reg. 37872 (June 5, 1980), rather than damages for actual interest expenses. Therefore, it is apparent that the issue of recovery of actual interest expenses as an item of damages for violation of the Act was not presented to the Secretary. Evidence of the amount of actual interest expenses and argument that they should be included in the measure of damages were first presented to this court.

The defendant argues that this court lacks jurisdiction to modify the reparations award by giving the plaintiffs additional relief, because the Secretary declined to grant actual interest damages by awarding interest at a flat rate instead and because the plaintiffs declined to seek judicial review under 5 U.S.C. §§ 702 and 703. As

discussed above, I do not agree that the issue of actual interest was presented to the Secretary, although some of the evidence relevant to the claim came out in a different context. Nor do I agree that the court lacks subject matter jurisdiction to award more relief than was given by the Secretary. The Administrative Procedure Act is not an independent jurisdictional provision; rather, 28 U.S.C. § 1331, "subject only to preclusion-of-review statutes created or retained by Congress, [confers] jurisdiction on federal courts to review agency action." *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The procedure for review is provided by the Administrative Procedure Act, unless overridden by a more specific statute, but jurisdiction comes from the general statute granting district courts jurisdiction over federal questions.

The cases cited by the defendant are inapposite. *United States v. ICC*, 337 U.S. 426 (1949), merely applied the traditional election-of-remedies doctrine to the remedy section of the Interstate Commerce Act. The court restated what 49 U.S.C. § 9 said explicitly: although damages for a violation of the Act may be sought either by complaint to the ICC or by court action, if a remedy is pursued in one forum, a fresh action in the other forum is barred. However, the court pointed out that the election rule does not prevent a shipper whose ICC complaint is denied from seeking court review of the denial under 28 U.S.C. § 1336. While there is no specific jurisdictional statute for review of denial of Packers and Stockyards Act complaints, none is necessary since the elimination of the \$10,000 jurisdictional requirement from § 1331. In *Crain v. Blue Grass Stockyards Co.*, 399 F.2d 868 (6th Cir. 1968), the court held that a plaintiff under who chose under 7 U.S.C. § 209(b) to seek a court remedy directly should have brought an administrative claim first because it was based on issues within the "primary jurisdiction" of the Secretary. In *United States v. Bass*, 215 F.2d 9 (8th Cir. 1954), the court held that the district court could enforce an order of the Reconstruction Finance Corporation but could not modify it because a statute provided that only the Emergency Court of Appeals had jurisdiction to review such orders.

In the present case, the plaintiffs did go to the Secretary first and now are seeking to enforce the portion of the order in their favor and to modify it to add relief not sought from the agency. While it would have been preferable for the actual interest claim to have been presented to the Secretary in the reparations proceedings, on balance the interests of the government and the defendant are not weighty enough to require either remand of that portion of the claim or its dismissal on the basis of waiver. The actual interest claim is wholly dependent on the finding of an unjust practice,

the same question underlying the relief granted by the Secretary. The underlying question certainly was one properly committed to initial determination by the agency as a matter within its primary jurisdiction. Interpretation of the Act and of the Agency's own regulations are matters best addressed first by the agency because of its special knowledge and expertise in the area. However, the question of the proper remedy in a reparations proceeding does not invoke such special administrative expertise. Under 7 U.S.C. § 209 the defendant is liable for "the full amount of damages sustained in consequence of such violation." While setting standards for the just and reasonable rendering of stockyard services may be a matter committed to the agency's domain, determining questions of damages and causation has been a judicial function for centuries. Section 210(f) requires *de novo* judicial review of questions of law. While deference is due the Secretary on such mixed question of fact and law as whether the facts of the case show an "unjust practice," no such deference would be due on the mixed fact/law questions of causation and compensation. The review scheme contemplates that the court would take evidence to rebut or support the Secretary's factual findings; therefore, it is not necessary to give the agency a chance to develop the factual record on the actual interest issue.

Under the circumstances present here, I see no danger to the integrity of the agency's adjudicative process if these plaintiffs or others are allowed during the enforcement action in court to seek items of damage they did not seek at the agency level. There is no procedural advantage to sandbagging the claim. To the contrary, had the defendant chosen to pay the award rather than compel the plaintiffs to go to court to enforce it, the plaintiffs would have lost any opportunity to present the omitted claim later. The incentive is to present the entire case to the Secretary. Also, the defendant has pointed to no prejudice to its ability to defend against the actual interest claim as a result of the plaintiffs waiting (or forgetting) to bring it until now.

The remedy provisions of the Packers and Stockyards Act are significantly different from those of the National Labor Relations Act. The latter give the regulatory agency alone the power to hear complaints of unfair labor practices, to order a violator to cease and desist the practice, "and to take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). Review from the board's order is to the court of appeals on the agency record, findings of the board are conclusive as to the facts, although the court may remand to the board for additional evidence, and the appellate court may not consider any objection that

was not urged before the board. § 160(e). In light of this scheme, the Supreme Court has held that the court of appeals erred when it modified the board's cease-and-desist order by adding reimbursement of litigation expenses and excess organizational costs resulting from the defendant's illegal conduct, because the question of what remedies will best effectuate the purpose of the labor laws was committed by Congress to the board. *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974). By contrast, the remedy provision involved here simply allows those injured by a violation to recover resulting damages as a remedy cumulative to, rather than in place of, existing common law or statutory remedies and gives concurrent jurisdiction to the Secretary and the district courts (subject to the judicial gloss of the primary jurisdiction doctrine). The Act is structured so that its purposes are furthered by compensation *per se*, rather than on a case-by-case discretionary basis. The court may award all compensation to which the plaintiffs are entitled even though a portion was not considered by the Secretary.

Therefore, the actual interest claim is properly before the court. The next question is whether the plaintiffs should be allowed actual interest damages rather than the flat rate allowed by the Secretary. This inquiry goes not to whether the Secretary made an error of law or acted arbitrarily, but to whether the plaintiffs have proven their second cause of action. If they are entitled to recover actual interest, the prejudgment interest component of the reparations order must fall as duplicative rather than as erroneous.

Much of what I have said about why a prejudgment interest award is proper for compensating victims of unjust stockyards practices also supports my conclusion that actual interest should be awarded when that provides a more accurate measure of the plaintiff's losses. The Secretary's notice of a proposed increase from 8 to 13 percent in the prejudgment interest rate for reparation awards noted that the reason for the change was "to bring such rate more in line with current rates of interest." 45 Fed. Reg. 19590 (March 26, 1980). The purpose of prejudgment interest in general is to allow compensation more closely approximating the plaintiff's actual losses than would mere payment of the amount originally withheld. The Act itself calls for award of the plaintiff's "full amount of damages." Where the evidence of the actual amount of interest paid in consequence of the violation is available, that measure more accurately compensates the plaintiff than does the flat rate of the agency's policy. "Where there is more than one method of estimating damages, that method which is most definite and certain should be adopted. . . . [T]hat one should be chosen which best achieves the fundamental purpose of compensation to

the injured person for his loss. . . .” *Big Rock Mountain Corp. v. Stearns-Roger Corp.*, 388 F.2d 165, 170 (8th Cir. 1968).

Under 7 U.S.C. § 209(a), the plaintiffs are entitled to their full damages “sustained in consequence” of the violation. While principles of restitution might support allowing interest only on the portion of the net sales proceeds retained by the defendant, because the defendant has benefitted from retention of those funds, the purpose of compensation inherent in the statute supports allowance of interest on all of the net sales proceeds. It certainly was foreseeable to a man with Lenhart’s experience in the cattle business that a rancher who parted with nearly \$58,000 worth of cattle without being paid would have to borrow to cover the loss and would thereby incur interest expenses. The plaintiffs have adequately proven, through the testimony of Dean Rowse and Daniel Kramer, that the sole cause of the \$58,000 loan in early April 1980 was to replace agricultural operating funds lost because of the failure of the defendant to pay out the proceeds of the sale according to the federal regulations.

However, interest is not recoverable on all \$58,000. The net sales proceeds that should have been paid to Kaba or the Rowses amounted to \$57,184.33. The Secretary also required forfeiture of the commission, but this amount is more in the nature of a penalty for the violation of the Act than compensation for the plaintiff’s injuries. Had the defendant adhered to the regulations, the defendant would have been entitled to retain the commission and that amount would not have been available to the plaintiffs. Prejudgment interest generally is not available on penalties. *United States v. West Texas Cottonoil Co.*, 155 F.2d 463, 466-67 5th Cir. 1946). The amount of the loan over the amount of the sales proceeds cannot be said to have been caused by the defendant’s violation.

Therefore, the only portion of the award against which prejudgment interest could be charged as compensation for actual interest expenses is the amount of the net sales proceeds. The evidence is clear that no part of the \$58,000 loan has been repaid and that no interest on the balance has been paid. That allows calculation of the amount of the interest properly attributable to the retention of the net sales proceeds. As of the date of trial, December 11, 1984, there had accrued \$59,067.75 in interest on the full \$58,000 principal. The proportion attributable to the \$57,184.33 net sales proceeds is \$58,237.06. Since the trial, interest on the entire balance has been accruing at a rate of \$41.41 per day. This converts to a rate of \$40.83 attributable to the net sales proceeds. Though the forfeited commission of \$692.80 should not draw interest before its forfeiture, the levy of interest against it at the rate set by agency

policy, 13 percent, is appropriate from the date of the Secretary's order—from that point the interest is more akin to post-judgment interest, but the statutory rate of 28 U.S.C. § 1961 does not apply because the award was not by a district court. After the date of judgment, interest will accrue on the entire judgment at the rate set by 28 U.S.C. § 1961.

In summary, the damages consist of the following amounts:

—\$57,184.33 in compensatory damages for failure to pay the net sales proceeds in accordance with regulations;

—\$692.80 as forfeiture of the commission on the sale of the cattle;

—\$58,237.06 in damages for actual interest expenses until the date of trial, December 11, 1984, plus \$40.83 for each day from December 12, 1984 until the date of final judgment;

—Simple interest on the forfeited commission at the rate of 13 percent per annum from the date of the Secretary's order, February 3, 1984, until the date of final judgment.

DISCIPLINARY DECISIONS

In Re: RONALD L. DAALE d/b/a GEHAN LIVESTOCK MARKETING AGENCY. P&S Docket No. 6214. Decided March 1, 1984.

Issuing insufficient funds checks; failure to pay when due; failure to remit to owners net proceeds; failure to deposit to custodial account; suspension—Consent.

Allan Kahan, for complainant.

Gary E. Wenell, Sioux City Iowa, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronald L. Daale is an individual, doing business as Gehan Livestock Marketing Agency, and his business mailing address is 214 Livestock Exchange Building, Sioux City, Iowa 51107.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock purchased;

3. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

4. Failing to remit to the owners, shippers and consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;

5. Failing to deposit in his Custodial Account for Shippers' Proceeds within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) an amount equal to the proceeds receivable from the sale of consigned livestock;

6. Failing to pay the owners, shippers and consignors of livestock sold on a commission basis with checks drawn on his Custodial Account for Shippers' Proceeds; and

7. Failing to otherwise maintain and use his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR 201.42).

Respondent is suspended as a registrant under the Act for a period of four (4) months.

These provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: JOHN P. McGRAW, P&S Docket No. 6244. Decided March 1, 1984.

Engaged in business without bonding; suspended as registrant; civil penalty—Consent.

Barbara S. Harris, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John P. McGraw, hereinafter referred to as the respondent, is an individual whose mailing address is 909 Sandy Lane, Marshall, Missouri 65340.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent John P. McGraw, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: JERRY M. GILMORE. P&S Docket No. 6229. Decided March 8, 1984.

Failure to deposit to shippers' account; failing to maintain shippers' account; paying for livestock with funds from shippers' account; misuse of funds—Consent.

Peter Train, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the act and that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent admits the jurisdictional allegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jerry M. Gilmore, hereinafter referred to as the respondent, is an individual doing business as Shelbyville Livestock Market. Respondent's mailing address is P.O. Box 467, Shelbyville, Tennessee 37160.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Shelbyville Livestock Market stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, Jerry M. Gilmore, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his custodial account for shippers' proceeds, within the time prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) an amount equal to the proceeds receivable from the sale of consigned livestock;
2. Failing to otherwise maintain and use his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
3. Paying for livestock purchased on a dealer basis with checks drawn on his custodial account for shippers' proceeds;
4. Using funds received as proceeds from the sale of consigned livestock for purposes of his own or for any purpose other than the payment of net proceeds to the owner, consignor, or shipper of such livestock, or the payment of sums due the respondent as compensation for the services and for the payment of lawful marketing charges;
5. Failing to designate the account in which proceeds due consignors from the sale of their livestock on a commission basis are deposited as a custodial account for shippers' proceeds;
6. Permitting his auctioneer or other employees performing duties of comparable responsibility in connection with the actual conduct of auction sales by the market agency, to purchase livestock out of consignment for any purpose; and
7. Failing to pay, when due, the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until he demonstrates that he is no longer insolvent and that the deficit in his custodial account for shippers' proceeds has been eliminated. When respondent demonstrates that he is no longer insolvent and that the deficit in his custodial account for shippers' proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the twenty-eight (28) day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: BENJAMIN L. HOWELL, JR., JOSEPH K. HOWELL, HOWELL SALES COMPANY, FARMVILLE LIVESTOCK MARKET, INC., and ORANGE LIVESTOCK MARKET, INC. P&S Docket No. 6091. Decided March 9, 1984.

Failure to deposit to custodial account; misuse of funds; failure to maintain; issuing insufficient funds checks; failure to remit net proceeds—Consent.

Allan Kahan, for complainant.

Frankie C. Coyner, *Stuarts Draft, Virginia*, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR § 1.138).

The respondents Joseph K. Howell, Howell Sales Company and Orange Livestock Market, Inc., admit the jurisdictional allegations in paragraph I of the Amended Complaint as then apply to them and specifically admit that the Secretary has jurisdiction in this matter and such additional facts which accurately reflects the situation as it exists today, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Howell Sales Company is a corporation organized and existing under the laws of the State of Virginia. Its mailing address is P.O. Drawer #1, Verona, Virginia 24482.

2. Respondent Howell Sales Company, at all times material to the allegations of this complaint, was:

(a) Engaged in the business of conducting and operating the Orange Livestock Market stockyard at Orange, Virginia; the Blackstone Livestock Market stockyard at Blackstone, Virginia; and the Farmville Livestock Market stockyard at Farmville, Virginia, stockyards posted under and subject to the provisions of the Act;

(b) Engaged in the business of buying and selling livestock on a commission basis at these three stockyards; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce.

3. Respondent Joseph K. Howell, is an individual whose business mailing address is P.O. Box 226, Orange, Virginia 22960.

4. Respondent Joseph Howell, at times material to the allegations of this complaint, and until at least August, 1982, was the Vice-President and owner of approximately 50 percent of the stock of respondent Howell Sales Company.

5. Respondents Benjamin and Joseph Howell, at times material to the allegations of this complaint, managed and controlled the business operations of respondent Howell Sales Company. They established its policies and practices, including those acts and practices which constitute the violations of the Act and regulations alleged in this complaint.

6. Respondents Benjamin Howell and Joseph Howell at all times material herein were engaged in the business of buying and selling livestock on a commission basis in commerce and engaged in business as a market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

7. During August, 1982, respondents Benjamin and Joseph Howell restructured their livestock operations, and, in connection with this restructuring, caused respondent Howell Sales Company to sell or transfer the Orange Livestock Market stockyard facility and market agency operations to a new corporate entity, Orange Livestock Market, Inc., and to sell or transfer the Farmville Livestock Market and Blackstone Livestock Market stockyards and market agency operations to an already existing corporate entity, Farmville Livestock, Inc., which is owned by the individual respondents and other members of their family. Since August, 1982, respondents Benjamin and Joseph Howell operating through these several corporate entities, have continued to carry on business as a market agency subject to the Act, buying and selling livestock in commerce. In May, 1983, respondents Benjamin Howell and Farmville Livestock Market, Inc. discontinued their operations at both the Farmville Livestock Market and Blackstone Livestock Market stockyards.

8. Respondent Orange Livestock Market, Inc., is a corporation organized and existing under the law of the State of Virginia. Its mailing address is P.O. Box 226, Orange, Virginia 22960.

9. Respondent Orange Livestock Market, Inc., is now, and since approximately August, 1982, was:

(a) Engaged in the business of buying and selling livestock in commerce on a commission basis at the Orange Livestock Market, Inc. stockyard, Orange, Virginia; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

10. Respondent Orange Livestock Market, Inc., is managed, directed and controlled by respondent Joseph Howell.

11. As of March 31, 1983, the Custodial Account for Shippers Proceeds of Orange Livestock Market, Inc., was in balance.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Joseph K. Howell, Jr., individually or as an officer, director, agent or employee of respondent Howell Sales Company, Farmville Livestock Market, Inc., or Orange Livestock Market, Inc., directly or indirectly through any corporate or other device, and respondent Orange Livestock Market, Inc., its officers, directors, agents or employees, directly or indirectly through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of livestock on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of the net proceeds to the owners or consignors of such livestock;

3. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the requirements of section 201.42 of the regulations (9 CFR § 201.42);

4. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

5. Failure to remit to the owners or consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The order issued April 8, 1980, in P. & S. Docket No. 5651 against Howell Sales Company remains in effect and the provisions

of that order are incorporated in and made a part of this Decision and Order.

In addition, Howell Sales Company, its officers, directors, agents or employees, directly or indirectly through any corporate or other device, in connection with its business operations subject to the Act, shall cease and desist from:

1. Using funds received as proceeds from the sale of livestock on a commission basis for purposes of its own or for any purpose other than the payment of lawful marketing charges and the remittance of the net proceeds to the shippers, owners or consignors of such livestock;

2. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

3. Failing to remit to the owners or consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The order issued May 17, 1979, in P. & S. Docket No. 5488 against Farmville Livestock Market, Inc., Joseph K. Howell and Benjamin L. Howell, Jr., remains in effect, and the provisions of that order are incorporated in and made a part of this Decision and Order.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business operations subject to the Act, including invoices and accounts of sale which show the true and correct names of the consignors of livestock.

Respondent Joseph K. Howell is assessed a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

The provisions of this Order shall become effective on the sixth day after service upon the respondents.

In Re: JERRY BELL, DAISY REYKER-BELL and JIM MORGAN, d/b/a CLOUD COUNTY LIVESTOCK AUCTION. P&S Docket No. 6194. Decided March 13, 1984.

Engaged in business without bonding; issuing insufficient funds checks; failure to pay when due—Consent.

Allan Kahan, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Jim Morgan admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jim Morgan, hereinafter referred to as respondent Morgan, is an individual whose business mailing address was P.O. Box 176, Hwy 9 West, Glasco, Kansas 67445.

2. Respondents Jerry Bell, Daisy Bell and Morgan were partners doing business as Cloud County Livestock Auction, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Cloud County Livestock Auction stockyard, a posted stockyard under the Act;

(b) Engaged in the business of selling livestock in commerce on a commission basis at Cloud County Livestock Auction stockyard and buying and selling livestock in commerce for their own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

Respondent Jim Morgan having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jim Morgan, individually or through any partnership, corporation or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business subject to the Act in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations;

2. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds to pay such checks on deposit and available in the account from which such checks are to be paid;

3. Failing to pay, when due, the full purchase price of livestock;

4. Failing to deposit in his "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock; and

5. Failing to otherwise maintain his "Custodial Account for Shippers' Proceeds" in strict conformity with the requirements of section 201.42 of the regulations (9 CFR § 201.42).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: TOPPENISH LIVESTOCK COMMISSION CO., NORTH-HOP, INC.,
WILLIAM D. NORTHOVER and BARBARA Y. NORTHOVER. P&S
Docket No. 6146. Decided March 15, 1984.

Engaged in business while insolvent; failing to deposit in custodial account; issuing insufficient funds checks; failure to remit when due—Consent.

Jory Hochberg, for complainant.

Reed C. Pell, Yakima, Washington, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondents does not meet the requirements of the Act and that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and con-

sent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Toppenish Livestock Commission Co., hereinafter referred to as respondent Toppenish, is a corporation organized and existing under the laws of the State of Washington. Its business mailing address is Box 348, Toppenish, Washington 98948.

2. Respondent Toppenish is, and at all times material herein was

(a) Engaged in the business of conducting and operating the Toppenish Livestock Commission Co. stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. North-Hop, Inc., hereinafter referred to as respondent North-Hop, is a corporation organized and existing under the laws of the State of Washington. Its business mailing address is Box 348, Toppenish, Washington 98948.

4. Respondent North-Hop is, and at all times material herein was, the owner of all the outstanding stock issued by respondent Toppenish.

5. William D. Northover, hereinafter referred to as respondent William Northover, is an individual whose business mailing address is Box 348, Toppenish, Washington 98948.

6. Respondent William Northover is, and at all times material herein was:

(a) President of respondents Toppenish and North-Hop;

(b) Owner of 50% of the outstanding stock issued by respondent North-Hop; and

(c) Responsible for the direction, management and control of respondents Toppenish and North-Hop.

7. Barbara Y. Northover, hereinafter referred to as respondent Barbara Northover, is an individual whose business mailing address is Box 348, Toppenish, Washington 98948.

8. Respondent Barbara Northover is, and at all times material herein was:

(a) Vice-President of respondents Toppenish and North-Hop;

(b) Owner of 50% of the outstanding stock issued by respondent North-Hop; and

(c) Responsible for the direction, management and control of respondents Toppenish and North-Hop.

9. Respondents North-Hop, William Northover and Barbara Northover, through respondent Toppenish, are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Toppenish Livestock Commission Co. stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) A market agency, selling livestock in commerce on a commission basis, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Toppenish and North-Hop, their officers, directors, agents and employees, and respondents William Northover and Barbara Northover, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a market agency or as a dealer while their current liabilities exceed their current assets;

2. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42(c) of the regulations (9 CFR 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR 201.42);

4. Issuing checks in payment of the net proceeds due from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment; and

5. Failing to remit, when due, the full amount of the net proceeds due from the sale of consigned livestock.

Respondent Toppenish is suspended as a registrant subject to the Act for a period of fourteen (14) days and thereafter until it demonstrates that its custodial account is currently in balance and that its current assets exceed its current liabilities. When respondent Toppenish demonstrates that its custodial account is currently in balance and that its current assets exceed its current liabilities, a supplemental order will be issued in this proceeding, terminating this suspension after the expiration of the fourteen (14) day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In Re: PRODUCERS LIVESTOCK MARKETING ASSOCIATION. P&S Docket No. 6202. Decided March 15, 1984.

Obtaining money from purchasers by false or deceptive means, misrepresentation; preparing or issuing inaccurate billings—Consent.

Jory Hochberg, for complainant.

Ben E. Rawlings, Salt Lake City, Utah, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Producers Livestock Marketing Association, hereinafter referred to as the respondent, is a producer-cooperative incorporated and existing under the laws of the State of Utah. Its business address is 170 West Cudahy Lane, North Salt Lake, Utah 84054.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating Producers Livestock Marketing Association stockyards at, among other places, Roseville, California and Madera, California, both of which are posted stockyards under the Act;

(b) Engaged in the business of selling livestock on a commission basis at its Roseville and Madera stockyards, buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Producers Livestock Marketing Association, its successors, officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in any act, practice, or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

2. Misrepresenting to the purchasers of livestock, or aiding and assisting any person to misrepresent to the purchasers of livestock, the original purchase prices of such livestock;

3. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings or any other document showing false, inaccurate or misleading price entries for such livestock;

4. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction;

5. Collecting payment from the purchasers of livestock, or aiding and assisting any person to collect from the purchasers of livestock, on the basis of false, inaccurate or misleading invoices or billings; and

6. Failing to disclose its ownership of livestock when using such livestock to fill orders for its principals.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its business subject to the Packers and Stockyards Act, including accountings, invoices and billings which show the true and correct prices of livestock.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Seven Thousand Five Hundred Dollars (\$7,500.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: INTERNATIONAL CATTLE COMPANY, SOUTHERN LIVESTOCK, INC., MIKE TOMKOW JR., CECIL M. YATES SR., D.L. CRUM, C.W. BAILEY and ERNIE L. KENNEDY. P&S Docket No. 6076. Decided March 23, 1984.

Engaging in business as dealer while insolvent; Issuing insufficient funds checks; failing to pay when due; failing to pay full price—Consent.

Barbara Harris, for complainant.

Thomas E. Baynes Jr., Lake Wales, Florida, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION FOR MIKE TOMKOW JR.

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondent International Cattle Co.'s financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Southern Livestock, Inc., admits the jurisdictional allegations in paragraphs I(a), I(b), and I(c) of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Southern Livestock, Inc., hereinafter referred to as respondent Southern, is a corporation whose principal place of business was, until on or about September 29, 1977, located in Plant City, Florida and whose business address is P.O. Box 26, Lakeland, Florida 33802.

2. Respondent Southern, until on or about September 29, 1977, was:

(a) Engaged in the business of buying and selling livestock in commerce; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. On or about October 11, 1977, respondent Southern's registration as a dealer under the Act was suspended and it ceased business operations.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Southern, its officers, directors, agents, employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while its current liabilities exceed its current assets;
2. Issuing checks or drafts in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks or drafts are drawn to pay such checks or drafts when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

The suspension of registration imposed upon respondent Southern in P. & S. Docket No. 5411 continues in full force and effect, and no supplemental order will be issued pursuant to the terms of that order for a period of two (2) years from the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re INTERNATIONAL CATTLE COMPANY, SOUTHERN LIVESTOCK, INC., MIKE TOMKOW JR., CECIL M. YATES SR., D.L. CRUM, C.W. BAILEY and ERNIE L. KENNEDY. P&S Docket No. 6076. Decided March 23, 1984.

Engaging in business as dealer while insolvent; issuing insufficient funds checks falling to pay when due; failing to pay full price—Consent.

Barbara Harris, for complainant.

Thomas E. Baynes Jr., Lake Wales, Florida, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION FOR D.L. CRUM

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondent International Cattle Co.'s financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent D. L. Crum admits the jurisdictional allegations in paragraphs I(f), I(g) and I(i) of the complaint, neither admits nor denies the allegations in paragraph I(1) of the complaint, and specifically admits that at all times material to the complaint, he purchased livestock as the agent of respondent ICC and was, therefore, a dealer within the meaning of the Act. Respondent Crum waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. D. L. Crum, hereinafter referred to as respondent Crum, is an individual whose address is 1404 South Collins Street, Plant City, Florida 33566.

2. Respondent Crum was, during its operational life, secretary and treasurer of respondent Southern and, in combination with respondents Yates and Tomkow, owns 100 percent of the stock of respondent Southern.

3. Respondent Crum, at all times material herein, directed, managed and controlled the business activities of respondent Southern in combination with respondents Yates and Tomkow.

4. Respondent ICC, at all times material herein, was engaged in the business of buying and selling livestock in commerce and was registered with the Secretary of Agriculture as a dealer.

5. Respondent Crum, at all times material herein, purchased livestock as the agent of respondent ICC, and, therefore, was a dealer within the meaning of the Act.

CONCLUSIONS

Respondent D.L. Crum, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent D.L. Crum, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while his current liabilities exceed his current assets;

2. Issuing checks or drafts in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks or drafts are drawn to pay such checks or drafts when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Crum is assessed a civil penalty in the amount of \$15,000.00 (Fifteen thousand dollars).

The provisions of this order shall become effective on the sixth day after service of this order on respondent.

In Re: INTERNATIONAL CATTLE COMPANY, SOUTHERN LIVESTOCK, INC., MIKE TOMKOW JR., CECIL M. YATES SR., D. L. CRUM, C. W. BAILEY and ERNIE L. KENNEDY. P&S Docket No. 6076. Decided March 23, 1984.

Engaging in business as dealer while insolvent—issuing insufficient funds checks—failing to pay when due—failing to pay full price—Consent.

Barbara Harris, for complainant.

Thomas E. Baynes Jr., Lake Wales, Florida, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION FOR ERNIE L. KENNEDY

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that respondent International Cattle Co.'s financial condition does not meet the requirements of the Act and that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.133).

Respondent Ernie L. Kennedy admits the jurisdictional allegations in paragraphs I(m) and I(n) of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ernie L. Kennedy, hereinafter referred to as respondent Kennedy, is an individual whose address is c/o B. H. Kraemer, Inc., Box 968, Live Oak, Florida 32060, and who was, during their operational lives, an employee of respondent Southern and of respondent ICC.

2. Respondent Kennedy was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce as the employee or agent of the vendor or purchaser; and

(b) A dealer within the meaning of the Act.

* the word "in" supplied by the Administrative Law Judge.

CONCLUSIONS

Respondent Ernie L. Kennedy, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Ernie L. Kennedy, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while insolvent, *i.e.*, while his current liabilities exceed his current assets;
2. Issuing checks or drafts in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks or drafts are drawn to pay such checks or drafts when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent Kennedy is assessed a civil penalty in the amount of \$3,000.00 (Three thousand dollars).

The provisions of this order shall become effective on the sixth day after service of this order on respondent.

In Re: TOMMY W. WELCH. P&S Docket No. 6243. Decided March 23, 1984.

Consent Decision.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to

the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Tommy W. Welch, hereinafter referred to as the respondent, is an individual whose principal place of business is located in Sophia, North Carolina, and whose business mailing address is Route 2, Box 33, Sophia, North Carolina 27350.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Welch, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds to pay such checks on deposit and available in the bank account(s) from which such checks are to be paid;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent shall keep and maintain records which fully and correctly disclose all transactions involved in his business subject to the Act, including a cash receipts and cash disbursements journal, an accounts payable and accounts receivable ledger, complete rec-

conciliations of his dealer livestock bank accounts and complete check registers.

Respondent Welch is suspended as a registrant under the Act for a period of ninety days and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the ninety day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: DOYLE REX WYATT d/b/a COWTOWN HORSE AND MULE AUCTION and CENTRAL VALLEY HORSE AUCTION. P&S Docket No. 6145. Decided March 28, 1984.

Purchasing livestock from consignments for resale for his own speculative accounts—issuing accounts of sale which fail to show full and correct names of purchases—charging, demanding or collecting a greater, less, or different compensation for stockyard services than the specified rates—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Doyle Rex Wyatt, hereinafter referred to as the respondent, is an individual doing business as Cowtown Horse and Mule Auction and as Central Valley Horse Auction. Respondent's principal place of business is located in Turlock, California, and his mailing address is 2925 South Golden State Boulevard, Turlock, California 95380.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Cowtown Horse and Mule Auction stockyard, Turlock, California, and the Central Valley Horse Auction at the Fresno Livestock Commission Company stockyard, Fresno, California, posted stockyards under the Act; and

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyards, and buying and selling livestock in commerce for his own account.

3. Respondent is registered with the Secretary of Agriculture as a market agency and dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the ontry of this decision, such decision will be entered.

ORDER

Respondent Wyatt, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock from consignments for resale for his own speculative account;

2. Issuing accounts of sale which fail to show the full, true and correct names of the purchasers of consigned livestock, and all other facts necessary to show fully the true nature of each transaction; and

3. Charging, demanding or collecting a greater or less or different compensation for stockyard services than the rates and charges specified in the schedule of rates and charges filed with the Secretary of Agriculture and in effect at the time such services are furnished.

Respondent Wyatt is suspended as a registrant under the Act for a period of 5 years.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: DANNY and GAYLON PERRYMON. P&S Docket No. 6189. Decided March 28, 1984.

Engaged in business without bonding—civil penalty—Consent.

Jory Hochberg, for complainant.

Herbert L. Ray, Salem, Arkansas, for respondent.

Decision by John G. Gilbert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Danny and Gaylon Perryman, hereinafter referred to as the respondents, are partners d/b/a Salem Horse Auction. Respondent's business mailing address is c/o P. O. Box 79, Viola, Arkansas 72583.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Salem Horse Auction stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Danny and Gaylon Perryman, individually or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondents are now in full compliance with the bonding requirements under the Act and the regulations, no suspension of their registration under the Act is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 218(b)), respondents are jointly and severally assessed a civil penalty in the amount of Seven Hundred Fifty Dollars (\$750.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In Re: SALMON RIVER LIVESTOCK COMMISSION INC. P&S Docket No. 6206. Decided March 28, 1984.

Engaged in business without bonding—registrant suspended—Consent.

Jory Hochberg, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Salmon River Livestock Commission, Inc., doing business as Salmon River Livestock Market, hereinafter referred to as the respondent, is a corporation with its principal place of business located at Salmon, Idaho. Respondent's mailing address is P.O. Drawer 1625, Salmon, Idaho 83467.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Salmon River Livestock Market stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Salmon River Livestock Commission, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

Respondent is suspended as a registrant under the Act until such time as it demonstrates that it is in full compliance with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: FARMERS LIVESTOCK MARKET, INC., ROBERT T. HARVEY JR., and MARIE R. HARVEY, individuals. P&S Docket No. 6231. Decided March 30, 1984.

Failing to maintain custodial account—failing to deposit to account—issuing insufficient funds checks—misuse of funds—failing to remit when due—Consent.

Roberta Swartzendruber, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Farmers Livestock Market, Inc., hereinafter referred to as the corporate respondent, is a corporation whose principal place of business was located at Rose Hill, Virginia, and whose current mailing address is P.O. Box 84, Rogersville, Tennessee 37857.

2. The corporate respondent, at all times material herein, was

(a) Engaged in the business of conducting and operating the Farmers Livestock Market, Inc., stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Robert T. Harvey, Jr., and Marie R. Harvey, hereinafter referred to as the individual respondents, are majority stockholders and are president and secretary-treasurer respectively of the corporate respondent.

4. The individual respondents directed, managed, and controlled all business activities of the corporate respondent.

5. Individual respondent Robert T. Harvey, Jr., at all times material herein, was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondents, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from:

1. Failing to maintain their "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to shippers;

4. Issuing checks to owners or consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented; and

5. Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of their livestock.

Corporate respondent is suspended as a registrant under the Act for a period of one year and thereafter until it demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated. When the respondents demonstrate that the defi-

cit has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the one year period of suspension.

Respondent Robert T. Harvey, Jr., is suspended as a registrant under the Act for a period of one year.

Respondent Marie R. Harvey is prohibited for a period of one year from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis, or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either on her own account or as the employee or agent of the vendor or purchaser.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In Re: McDOWELL CATTLE COMPANY, INC. a corporation, and T.J. McDOWELL an individual. P&S Docket No. 6269. Decided April 4, 1984.

Engaging in business while insolvent—issuing insufficient funds checks—failure to pay—failure to pay when due—Consent.

Roberto Swatzenbruber, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. McDowell Cattle Company, Inc., hereinafter referred to as the corporate respondent, is a corporation whose principal place of business is located at Albany, Georgia, and whose current mailing address is P.O. Box 3188, Albany, Georgia 31706.

2. The corporate respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. Respondent T. J. McDowell, hereinafter referred to as the individual respondent, is an individual whose business address is P.O. Box 3188, Albany, Georgia 31706.

4. Individual respondent, at all times material herein, was:

(a) Majority stockholder and president of the corporate respondent; and

(b) Directed, managed and controlled all business activities of the corporate respondent.

5. Individual respondent, at all times material herein, was engaged in the business of buying and selling livestock for his own account.

6. Individual respondent, at all times material herein, was a dealer within the meaning of that term as defined in the Act and subject to provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondent, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Issuing checks in payment for livestock without having sufficient funds to pay such checks on deposit and available in the bank account(s) from which such checks are to be paid;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

Corporate respondent is suspended as a registrant under the Act for a period of six months and thereafter until it demonstrates that it is no longer insolvent. When the corporate respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the six month period of suspension.

Respondent T. J. McDowell is prohibited for a period of six months from engaging in business or operating subject to the Act as a dealer or market agency.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

In Re: EDDIE S. JENSEN. P&S Docket No. 6242. Decided April 6, 1984.

Engaged in business without bonding—Consent.

*Roberta Swarzendruber, for complainant.
Respondent, pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued Thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Eddie S. Jensen, hereinafter referred to as the respondent, is an individual whose mailing address is Box 91, Thatcher, Idaho 83283.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent is now in compliance with the bonding requirements of the Act and regulations.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Eddie S. Jensen, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this decision on respondent.

In Re: MIDVALE COMPANY, HOWARD J. PICKREN, and FRED W. PICKREN. P&S Docket No. 6177. Decided April 9, 1984.

Falling to pay—falling to pay when due—failure to pay full price—Consent.

Barbara Harris, for complainant.

Everett E. Dahl, Midvale Utah, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint and notice of hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraphs I, II and II of the complaint and notice of hearing and specifically admit that the Secretary has jurisdiction in this matter,

neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Midvale Packing Company, hereinafter referred to as the corporate respondent, is a Utah corporation whose business mailing address is 420 So. Main, Box 95, Midvale, Utah 84047.

(b) Corporate respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

2. (a) Howard J. Pickren, hereinafter referred to as respondent Howard Pickren, is an individual whose business mailing address is 420 So. Main, Box 95, Midvale, Utah 84047.

(b) Respondent Howard Pickren is, and at all times material herein was:

(1) President of the corporate respondent;

(2) Owner, in combination with respondent Fred W. Pickren, of 100 percent of the outstanding stock of the corporate respondent; and

(3) Responsible, in combination with respondent Fred W. Pickren, for the direction, management and control of the corporate respondent.

3. (a) Fred W. Pickren, hereinafter referred to as respondent Fred Pickren, is an individual whose business mailing address is 420 So. Main, Box 95, Midvale Utah 84047.

(b) Respondent Fred Pickren is, and at all times material herein was:

(1) Vice-President of the corporate respondent;

(2) Owner, in combination with respondent Howard Pickren, of 100 percent of the outstanding stock of the corporate respondent; and

(3) Responsible, in combination with respondent Howard Pickren, for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and respondents Fred and Howard Pickren, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), the corporate respondent is assessed a civil penalty of One Thousand Dollars (\$1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

*In Re: HORST SCHOBER, NANCY WELLS, and NORTHERN NEW YORK FARMERS MARKETING COOPERATIVE, INC. P&S Docket No. 6182.
Decided April 10, 1984.*

Engaging in acts for the purpose of obtaining money by false pretenses—Consent.

Barbara Harris, for complainant.

Joseph McGuire, Lowville, New York for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR §1.138).

Respondent Northern New York Farmers' Marketing Cooperative, Inc., admits the jurisdictional allegations in paragraph 1C of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining al-

legations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Northern New York Farmers' Marketing Cooperative, Inc., herein referred to as Northern New York, is a corporation with its principal place of business located at Lowville, New York. Its business mailing address is Route 26, Box 169, Lowville, New York 13667.

2. Respondent Northern New York is, and at all times material herein

(a) Engaged in the business of conducting and operating the Northern New York Farmers' Marketing Cooperative, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as market agency to sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

Respondent Northern New York having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Northern New York, its officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses;

(2) Entering into, continuing in, or cooperating in any agreement, arrangement, understanding or course of business with any person for the purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses;

(3) Misrepresenting, or aiding and assisting any person to misrepresent, to its principals, to the principals of buyers purchasing livestock at its stockyard, or to other purchasers of livestock from respondent or at respondent's stockyard (a) the manner in which such livestock was purchased or acquired by respondent; (b) the

manner in which such livestock was sold or handled by respondent; (c) the origin or actual place of purchase or sale of such livestock; or (d) the actual purchase prices or purchase weights of such livestock;

(4) Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of sale, buyer invoices, billings, scale tickets or any other documents which show false, incorrect or misleading price or weight entries for such livestock, or which fail to disclose all facts necessary to show clearly and completely the true nature of each transaction; and

(5) Collecting, or aiding and assisting any person to collect, from the purchasers of livestock on the basis of false, incorrect, or misleading invoices or accountings.

Respondent Northern New York shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its business subject to the Packers and Stockyards Act, including accounts of sale, buyer invoices and scale tickets which show: (1) the true manner in which respondent sold or otherwise handled consigned livestock at its stockyard; (2) true and correct prices of all livestock sold at its stockyard; and (3) the true and correct weights of all livestock sold at its stockyard.

In accordance with section 312(b) of the Act (7 U.S.C. §213(b)), respondent Northern New York is assessed a civil penalty in the amount of \$3,000.00.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: RONALD M. REMSCHNER and JANET J. REMSCHNER, d/b/a ANTLERS LIVESTOCK COMMISSION, and JAMES ALEXANDER RATER. P&S Docket No. 6268. Decided April 10, 1984.

Failing to deposit to custodial account—misuse of funds—issuing insufficient funds checks—Consent.

Allan R. Kahan, for complainant.
Respondent, *pro se*.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS RONALD AND
JANET REMSCHNER

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201. *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Ronald and Janet Remschner admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them, and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ronald H. Remschner and Janet J. Remschner, hereinafter referred to as respondents Ronald and Janet Remschner, were partners doing business as Antlers Livestock Commission, and their business address is Box 444, Antlers, Oklahoma 74528.

2. Respondents were, at all times material herein:

(a) Engaged in the business of conducting and operating the Antlers Livestock Commission stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

CONCLUSIONS

Respondents Ronald and Jane Remschner having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Ronald and Janet Remschner, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42 of the regulations (9 CFR § 201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of livestock on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of the net proceeds to the owners or consignors of such livestock;

3. Failing to otherwise maintain and use properly their "Custodial Account for Shippers' Proceeds" in strict conformity with the requirements of section 201.42 of the regulations (9 CFR § 201.42);

4. Issuing checks in payment of the net proceeds due from the sale of consigned livestock without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

5. Failing to remit to the owners or consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock;

6. Exchanging or swapping drafts or checks with any person for the purpose or with the effect of concealing the true amount of funds on deposit and available in any checking or other bank account, or of creating a false balance in any such account.

Respondents Ronald and Janet Remschner are suspended as registrants under the Act for a period of six (6) months and thereafter until the deficit in their "Custodial Account for Shippers' Proceeds" has been eliminated. When respondents demonstrate that the deficit in their "Custodial Account for Shippers' Proceeds" has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the six (6) month period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

In Re: RAY H. MAYER and JIM DOSS. J&S Docket No. 6155. Decided April 12, 1984.

Failing to pay full price—issuing insufficient funds checks—suspension—Decision.

Respondent failed to file timely reply to the complaint. This was the third time respondent had been cited for the same offenses and so the sanctions are severe since his continual violation of the act is seen as flagrant and willful.

Thomas Heniz, for complainant.
T. L. Rees, Colorado City, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).¹ An initial decision and order with respect to respondent Doss upon admission of facts by reason of default was issued on October 31, 1983, by Administrative Law Judge Dorothea A. Baker ordering respondent to cease and desist from several practices, including failing to pay the full price of livestock. The order also suspends respondent as a registrant under the Act for two years.

On January 10, 1984, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).² Following complainant's response, the case was referred to the Judicial Officer for decision on April 10, 1984.

Respondent reserved "the right either to waive or insist upon oral argument" before the Judicial Officer. However, oral argument is discretionary (7 CFR § 1.145(d)), and, if requested, would be denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial decision and order is adopted as the final decision and order in this case, except that the effective date of the order is changed in view of the appeal, and the customary provisions to prevent evasion of suspension orders are added. See 1 Davidson, *Agricultural Law*, § 3.28 (1981). Additional conclusions by the Judicial Officer follow Judge Baker's conclusions.

¹ See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1983 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

² The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450e-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in letters of service that answers should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Jim Doss has failed to file an answer within the time prescribed in the Rules of Practice. Accordingly, the material facts alleged in the complaint pertaining to respondent Jim Doss, which are admitted by the failure of respondent Jim Doss to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. Jim Doss, hereinafter referred to as respondent Doss, is an individual with a mailing address at 750 Judge Ely #210, Abilene, Texas 79601. Respondent Doss, at all times material herein, was doing business as M&M Cattle Company.

2. Respondent Doss, at all times material herein, was engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis.

3. Respondent Doss is currently registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account.

4. Respondent Doss, doing business as M&M Cattle Company, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor, issued drafts which were returned unpaid because the respondent did not have sufficient funds available, or did not make sufficient funds available, to pay such drafts when presented for payment.

5. Respondent Doss, doing business as M&M Cattle Company, in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full amount of the purchase price of such livestock. As of March 25, 1983, there remained unpaid \$218,284.52 for such livestock purchases.

6. Respondent Doss, doing business as M&M Cattle Company, during the period from July 1, 1982, through July 31, 1982, issued drafts in payment for livestock without first obtaining express written agreements from the livestock sellers authorizing payment by draft.

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *four* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or to plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Even if respondent had not waived a hearing, under the Department's Rules of Practice (7 CFR § 1.146(a)(2)), respondent must set forth a "good reason" why the evidence was not adduced at the original hearing. This is similar to the judicial practice regarding newly discovered evidence. *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1320 (1977) (order denying rehearing), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); and see *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 428-29 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, No. 83-5098 (3d Cir. Dec. 30, 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying rehearing), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'g* 40 Agric. Dec. 1468), *appeal docketed*, No. 82-6029 (9th Cir. Nov. 23, 1982); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-1167); *In re Winger*, 38 Agric. Dec. 182, 188 (1979). Respondent has made no showing that would warrant a hearing or "rehearing."

Respondent contends that the two-year suspension of his registration under the Act constitutes a confiscation of property in violation of due process of law. However, the administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co. v. Secretary of Agriculture*, 131 F.2d 651, 659 (1st Cir. 1943). And

see *In re Worsley*, 33 Agric. Dec. 1547, 1557 (1974) (Appendix to this decision, at 2a-3a).

Although the two-year suspension order is a severe sanction, respondent's violations are extremely serious and flagrant, warranting the sanction. In addition, this is the third time respondent has been charged with issuing insufficient funds checks and failing to pay when due for livestock purchases. In 1966, respondent was ordered to cease and desist from failing to pay when due for livestock purchases (*In re Doss*, 25 Agric. Dec. 331, 333 (1966)), and in 1979, respondent was fined \$1,000 and costs by the United States District Court for the Western District of Oklahoma for similar violations. Respondent has also been the subject of two other actions in the United States District Court for failure to register and furnish a bond, as required by the Act and regulations. Respondent's prior history of violations emphasizes the fact that a severe sanction is necessary here.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),³ set forth in the Appendix to this decision.⁴ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

³ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions, e.g., *In re Economou*, 32 Agric. Dec. 14, 116-29 (1973), *rev'd on other grounds*, 494 F.2d 519 (2d Cir. 1974), before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁴ Severe sanctions issued pursuant to this policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Belt-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenbath*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wye v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1152, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976).

Respondent argues that the livestock market agencies who were not paid for the livestock involved in this case will suffer if respondent's registration is suspended, since he will not be able to make restitution to them if his registration is suspended. But any harm that might result to such persons (or others, such as respondent's employees) from a suspension order is always disregarded in determining sanctions since the national interest of having fair and competitive conditions in the regulated agricultural industries must prevail over the local interests which might be temporarily damaged as a result of a suspension order.⁵

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Doss, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Issuing checks or drafts in payment for livestock without having and maintaining sufficient funds on deposit in the account.

(1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 10-88, 1089 (5th Cir. 1974).

⁵ *In re R. H. Produce, Inc.*, 42 Agric. Dec. ____ (Apr. 6, 1984); *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ____ (Aug. 31, 1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (1983) (order denying intervention) (creditor who would be damaged by disciplinary order against respondent not permitted to intervene in respondent's appeal proceeding), *final decision*, 42 Agric. Dec. ____ (Mar. 25, 1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, No. 82-3826, slip op. at 7 (6th Cir. Feb. 28, 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 20, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

upon which such checks or drafts are drawn to pay such checks or drafts when presented for payment;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing drafts in payment for livestock without first obtaining express, written agreements from the livestock sellers authorizing payment by draft.

Respondent Doss is suspended as a registrant under the Act for a period of two years.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions of this order shall become effective on the 30th day after service of this order on respondent; *Provided*, however, that if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

In re: LOUIS KLINE and LOUIS KLINE INC. P&S Docket No. 6142. Decided April 18, 1984.

Failure to maintain scales--Consent.

Civil Penalty.

Allan Kahan, for complainant.

John Woodcock Jr., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921 (*et seq.*) by a Complaint and Notice Of Hearing filed by the Packers and Stockyards Administrator of Agriculture, alleging that the respondent violated the Act and the regulations issued thereunder. This decision is entered pursuant

to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Louis Kline, hereinafter referred to as the individual respondent, is an individual whose business mailing address is 303 Beaver Street, Hollidaysburg, Pennsylvania 16648.

2. The individual respondent is, and at all times material herein was:

(a) President of respondent Louis Kline, Inc., and the owner of a majority of the stock of Louis Kline, Inc.; and

(b) Responsible for the management, direction and control of the practices and activities of Louis Kline, Inc.

3. The individual respondent is, and at all times material herein was, a packer within the meaning of and subject to the provisions of the Act.

4. Respondent Louis Kline, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Pennsylvania. Its business mailing address is 303 Beaver Street, Hollidaysburg, Pennsylvania 16648.

5. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of purchasing livestock in commerce for slaughter, and of manufacturing or preparing meats and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Louis Kline, Inc., its officers, directors, agents and employees, and respondent Louis Kline, directly or through a corporate or other device, shall cease and desist from:

1. Failing to maintain and operate any livestock or monorail scale owned or controlled by them in such a manner as to insure accurate and correct weights;

2. Operating any monorail scale owned or controlled by them unless the hooks, rollers, gambrels or other similar equipment used in connection with the weighing of carcasses of the same species of livestock are of uniform weight and the scale's tare has been adjusted and set to include only the weight of such equipment;

3. Failing to account and make final payment for livestock purchased on a carcass weight basis on the hot carcass weights of such livestock;

4. Weighing livestock, livestock carcasses or parts thereof other than their true and correct weights;

5. Recording inaccurate or incorrect weights on hot scale sheet or kill sheets, on accountings issued to the sellers of livestock, on carcass tags, or on any other record or document which purports to show the hot weights of livestock carcasses or parts thereof;

6. Paying the sellers of livestock, livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights;

7. Failing to disclose to the sellers of livestock on a carcass weight or carcass grade and weight basis, prior to the purchase of such livestock, complete and accurate details of the purchase contract, including the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, and grading to be used;

8. Taking any unauthorized or unsupported deductions from hot carcass weights of livestock purchased on a carcass weight or carcass grade and weight basis;

9. Taking any unauthorized or unsupported deductions from price per hundredweight or the total purchase price of livestock purchased on a carcass weight or carcass grade and weight basis;

10. Failing to prepare and issue to the sellers of livestock on a carcass weight or carcass grade and weight basis a true and correct written account of each transaction showing the number, weight and price of carcasses of each grade and of the ungraded carcasses, the number of condemnations and the explanation for any condemnations, the explanation for any adjustments made in the determination of the final purchase amount, and such other [

as may be necessary to show fully the true and correct nature of each transaction.

Respondents shall keep and maintain accounts, records and memoranda which completely and accurately disclose the nature of all transactions involved in their business operations as a packer, including: (1) hot scale sheets, kill sheets, hot carcass weight tags or other comparable records sufficient to show the individual carcass weights and the identity of the seller of livestock purchased by respondents on a carcass weight or carcass grade and weight; (2) accounts of purchase, invoices or other documents issued to the sellers of livestock on a carcass weight or carcass grade and weight basis showing the number of head, hot carcass weights and prices of each grade and of ungraded carcasses, the number of condemnations, the explanation for such condemnations and for any adjustments made in determining the final purchase amount, and such other facts as may be necessary to show the true and correct nature of each transaction.

Respondents shall keep and maintain a record of all complaints received from the sellers of livestock on a live weight, a carcass weight or a carcass grade and weight basis, concerning or relating to respondents' weighing of livestock and livestock carcasses, and payment therefor, for a period of two years after such complaint is received, including, but not limited to the following information:

- (1) name and address of the complaining sellers;
- (2) date of receipt of the complaint;
- (3) transaction about which the complaint is received;
- (4) exact nature of the complaint and its disposition; and
- (5) date of disposition.

Respondents shall deliver a copy of this decision and order to all of their personnel whose duties or responsibilities include the purchase of livestock for slaughter, the operation of livestock or monorail scales, the weighing of livestock or livestock carcasses, and the accounting to and payment of the sellers of livestock.

Respondents Louis Kline and Louise Kline, Inc. are jointly and severally assessed a civil penalty in the amount of Twenty Thousand Dollars (\$20,000.00). The payment of Fifteen Thousand Dollars (\$15,000.00) shall be suspended provided that for a period of (5) years from the effective date of this order, respondents shall not violate the cease and desist provisions of this order.

The provisions of this order shall become effective on the first day after service upon respondents.

In Re: GOLDEN WEST MEAT CO., INC. and JAMES DiCARO. 1
Docket No. 6186. Decided April 18, 1984.

Issuing insufficient funds checks—failure to pay when due—failure to pay price—Consent.

Barbara S. Harris, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint and notice of hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraphs I and II of the complaint and notice of hearing and specifically admit that the Secretary has jurisdiction in this matter, they admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Golden West Meat Co., Inc., a/k/a International Meat Products, Inc., hereinafter referred to as the corporate respondent, is an Arizona corporation whose business mailing address is 410 South 59th Avenue, Phoenix, Arizona 85009.

(b) Corporate respondent is, and at all times material hereto was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter and of manufacturing or preparing meat or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

2. (a) James DiCaro, hereinafter referred to as the individual respondent, is an individual whose business mailing address is 410 South 59th Avenue, Phoenix, Arizona 85009.

(b) The individual respondent is, and at all times material hereto was:

(1) Owner of one third (1/3) of the outstanding stock of the corporate respondent; and

(2) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and the individual respondent, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock

3. Failing to pay the full purchase price of livestock; and

4. Purchasing livestock on credit without obtaining from the sellers of such livestock a written acknowledgment that the sellers' rights to the trust provisions of section 206 of the Act are waived.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business under the Act including: (a) a cash receipts and cash disbursements journal; (b) an accounts receivable ledger; (c) an accounts payable ledger; and (d) a current record of inventory.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty of One Thousand Dollars (\$1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondents.

In re: SAN JUAN LIVESTOCK AUCTION INC. P&S Docket No. 6191. Decided April 18, 1984.

Engaged in business without bonding—Consent.

Thomas C. Hines, for complainant.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. San Juan Livestock Auction, Inc., hereinafter referred to as the respondent, is a corporation whose business mailing address is Box 55, East Sabina Avenue, Aztec, New Mexico 87410.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a marketing agency to sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. As of the date of this Decision and Order, respondent had acquired the bond required by the Act and the regulations.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent San Juan Livestock Auction, Inc., in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: HARLAN KRUSE, P&S Docket No. 6236, Decided April 18, 1984.

Engaged in business without bonding—issuing insufficient funds checks—failure to pay—failure to pay when due—Consent.

Roberta Swartzendruber, for complainant.

Deann Welder-Jomlinson, Marshalltown Iowa, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harlan Kruse, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 163, Toledo, Iowa 52342.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Harlan Kruse, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent;
2. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
3. Failing to pay, when due, for livestock purchased;
4. Failing to pay for livestock purchased.

Respondent Kruse is suspended as a registrant under the Act for a period of one year and thereafter until such time as respondent demonstrates that he is in full compliance with the bonding provisions of the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding provisions a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the one year period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

n Re: ROBERT D. COCKERHAM. P&S Docket No. 6275. Decided April 18, 1984.

issuing insufficient funds checks—failing to pay when due—failure to pay—Consent.

Trick Paul, for complainant.

William B. Deas, Kansas City Missouri, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of respondent Robert D. Cockerham failed to meet the requirements of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), and that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Robert D. Cockerham, also known as Delbert Cockerham, hereinafter referred to as the respondent, is an individual whose mailing address is P.O. Box 165, Crowville, Louisiana 71230.

(2) Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Robert D. Cockerham, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent shall keep and maintain accounts, records and memoranda that fully and correctly disclose all transactions involved in his business subject the Packers and Stockyards Act, including all sales invoices and other records showing the disposition of livestock purchased as a dealer.

Respondent Robert D. Cockerham is suspended as a registrant under the Act for a period of sixty days (60) and thereafter until he demonstrates that he is no longer insolvent. When respondent Cockerham demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the sixty-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

In Re: STANLEY I. SWANSON, an individual d/b/a KERSEY MEAT PROCESSING CO., and PIERCE MEAT PROCESSING CO., a corporation. P&S Docket No. 6038. Decided April 23, 1984.

Paying sellers on a "realizer" basis—making arbitrary weight deductions—altering weight entries—issuing insufficient funds checks—Consent.

Eric Paul, for complainant.

Kenneth F. Lind, Greeley Colorado, for respondent.

Decision by Victor Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). An amended complaint was subsequently filed to add additional allegations and to modify existing allegations. This decision is entered

pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the amended complaint and specifically admit the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Stanley I. Swanson, hereinafter referred to as respondent Swanson, is an individual who:

(a) At all times material herein occurring prior to April 1, 1982, was doing business as the Kersey Meat Processing Company, a sole proprietorship with a slaughtering plant located at 443 4th Street, Kersey, Colorado, and a mailing address of P.O. Box 555, Kersey, Colorado 80644;

(b) At all times material herein occurring prior to April 1, 1982, was engaged in the business of buying livestock in commerce for the purpose of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce;

(c) Is and at all times material herein was president and sole stockholder of the Pierce Meat Processing Company, a Colorado corporation with a slaughtering plant located at 726 Main Street, Pierce, Colorado, and a mailing address of P.O. Box 70, Pierce, Colorado 80650, and after April 1, 1982 a second slaughtering plant located at 443 4th Street, Kersey, Colorado, which is operated under the name Kersey Meat Processing Company;

(d) Is and at all times material herein was the person who managed, directed and controlled the operations of the Pierce Meat Processing Company; and

(e) Is and at all times material herein was a packer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

2. Pierce Meat Processing Company, hereinafter referred to as respondent Pierce, is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

ORDER

Respondent Robert D. Cockerham, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented;
2. Failing to pay, when due, for livestock purchases; and
3. Failing to pay for livestock purchases.

Respondent shall keep and maintain accounts, records and memoranda that fully and correctly disclose all transactions involved in his business subject the Packers and Stockyards Act, including all sales invoices and other records showing the disposition of livestock purchased as a dealer.

Respondent Robert D. Cockerham is suspended as a registrant under the Act for a period of sixty days (60) and thereafter until he demonstrates that he is no longer insolvent. When respondent Cockerham demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the sixty-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

In Re: STANLEY I. SWANSON, an individual d/b/a KERSEY MEAT PROCESSING CO., and PIERCE MEAT PROCESSING CO., a corporation. P&S Docket No. 6038. Decided April 23, 1984.

Paying sellers on a "realizer" basis—making arbitrary weight deductions—altering weight entries—issuing insufficient funds checks—Consent.

Eric Paul, for complainant.

Kenneth F. Lind, Greeley Colorado, for respondent.

Decision by Victor Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyard Act (7 U.S.C. 181 *et seq.*), by a complaint filed by the Administrator Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). A amended complaint was subsequently filed to add additional allegations and to modify existing allegations. This decision is entered

pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the amended complaint and specifically admit the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Stanley I. Swanson, hereinafter referred to as respondent Swanson, is an individual who:

(a) At all times material herein occurring prior to April 1, 1982, was doing business as the Kersey Meat Processing Company, a sole proprietorship with a slaughtering plant located at 443 4th Street, Kersey, Colorado, and a mailing address of P.O. Box 555, Kersey, Colorado 80644;

(b) At all times material herein occurring prior to April 1, 1982, was engaged in the business of buying livestock in commerce for the purpose of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce;

(c) Is and at all times material herein was president and sole stockholder of the Pierce Meat Processing Company, a Colorado corporation with a slaughtering plant located at 726 Main Street, Pierce, Colorado, and a mailing address of P.O. Box 70, Pierce, Colorado 80650, and after April 1, 1982 a second slaughtering plant located at 443 4th Street, Kersey, Colorado, which is operated under the name Kersey Meat Processing Company;

(d) Is and at all times material herein was the person who managed, directed and controlled the operations of the Pierce Meat Processing Company; and

(e) Is and at all times material herein was a packer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

2. Pierce Meat Processing Company, hereinafter referred to as respondent Pierce, is and at all times:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter, and manufacturing and preparing meats and meat food products for sale and shipment in commerce;

(b) A packer within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Pierce Meat Processing Company, its officers, directors, agents and employees, successors and assigns, and respondent Stanley I Swanson, individually or as an officer, director, agent or employee of respondent Pierce Meat Processing Company or of any other packer, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

(1) Paying livestock sellers for livestock purchased on a "realizer" or carcass weight basis on other than the actual (hot) carcass weights;

(2) Making arbitrary weight deductions from actual (hot) carcass

sellers with settlement sheets or account-
actual (hot) carcass weights of all live-
cass weight basis;

(4) Altering weight entries on daily kill sheets so as to reduce the actual (hot) carcass weights of livestock purchased on a carcass weight basis and using altered kill sheets to conceal the making of arbitrary weight deductions;

(5) Altering in any manner certificates of Ante-Mortem or Post-Mortem Disposition of Tagged Animals (USDA condemnation slips) or using such certificates to defraud or mislead in any manner the sellers of livestock;

(6) Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation;

(7) Failing to pay, when due, for livestock purchases;

(8) Failing to pay for livestock purchases;

(9) Failing to hold in trust assets required to be held in trust for the benefit of all unpaid cash sellers of livestock until all such cash sellers are paid; and

(10) Giving an unfair preference to any unpaid cash seller of livestock in the distribution of any asset subject to the *pro rata* interests of all unpaid cash sellers of livestock.

The respondents shall keep accounts, records, and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Act, including, but

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Michael Claude Edwards, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Fifty Dollars (\$550.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: DONAL A. DANIELS. P&S Docket No. 6225. Decided April 24, 1984.

Engaged in business without bonding--Consent.

Barbara Harris, for complainant.

William B. Deas, Kansas City, MO. for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et*

seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donal A. Daniels, hereinafter referred to as the respondent, is an individual whose mailing address is 35287 Munger Road, Tipton, Michigan 49287.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Donal A. Daniels, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

c. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Webb, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a dealer or market agency while his current liabilities exceed his current assets.
2. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

Respondent Webb is suspended as a registrant under the Act for a period of six months and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the six-month period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In Re: RAYMOND L. TUCKER and TOM J. TUCKER d/b/a TUCKER BROTHERS LIVESTOCK. P&S Docket No. 6276. Decided April 26, 1984.

Issuing insufficient funds checks—failing to pay when due—failing to pay full purchase price—Consent.

Allan R. Kahan, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondents Raymond L. Tucker and Tom J. Tucker, doing business as Tucker Brothers Livestock, are partners with the principal place of business located at Ft. Scott, Kansas, and whose business mailing address is Route #1, Fort Scott, Kansas 66701.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce for their own account; and

(b) Registered with the Secretary of Agriculture as a dealer in livestock, and buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Raymond Tucker and Tom Tucker, individually as partners, directly or through any corporate or other device or connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock;
and

3. Failing to pay the full purchase price of livestock.

Respondents shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in their business under the Act, including among other things: a general ledger of purchases and sales, including incidental livestock expenses; monthly bank account reconciliations with an outstanding check list and list of deposits in transit; a check and draft register; work records identifying the source of livestock, date of purchase, number of head, weight and cost of all livestock resold on a transfer of weight and/or cost basis; weighing records including scale tickets of any livestock reweighed in resale; a ledger identifying all assets and liabilities posted on a monthly basis; purchase invoices and accounts of sale; inventory records on a daily or weekly basis; sorting and pro-rate records for livestock sorted and sold on a pro-rata basis; and trucking and transportation invoices or billings.

Respondents are suspended as registrants under the Act for a period of two (2) years and thereafter until such time as respondents can show, to the satisfaction of the Packers and Stockyards Administration, that they are solvent; i.e. that their current assets exceed their current liabilities.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In Re: FRED O. ELLIS. P&S Docket No. 6260. Decided April 30, 1984.

Engaged in business without bonding—Consent.

*Barbara Harris, for complainant.
Respondent, pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred O. Ellis, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 162, Mocksville, North Carolina 27028.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Fred O. Ellis, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Two Hundred Fifty dollars (\$250.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

In Re: LOOMIS LIVESTOCK INC. P&S Docket No. 6278. Decided April 30, 1985.

Engaged in business without bonding—Consent.

Eric Paul, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Loomis Livestock, Inc., is a corporation with its principal place of business located at Mondovi, Wisconsin. Respondent's mailing address is P.O. Box 70, Mondovi, Wisconsin 54755.

2. Respondent Loomis Livestock, Inc., is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Loomis Livestock, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required by the Packers and Stockyards Act, as amended and supplemented, and the regulations promulgated thereunder, without filing and maintaining a reasonable bond or its equivalent as required by the Act and regulations.

Respondent Loomis Livestock, Inc., is suspended as a registrant under the Act until such times as it complies fully with the bonding requirements of the Act and regulations. When respondent demonstrates that it is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Two Thousand Dollars (\$2,000.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

In Re: MIKE FAGAN, P&S Docket No. 6204. Decided February 11, 1984.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer or plead specifically to any allegation of the complaint would com-

tute an admission of all the material allegations contained in the complaint.

Respondent wrote a letter, received by the Hearing Clerk on November 14, 1983, indicating that he was trying to obtain a bond to bring himself into compliance with the current Packers and Stockyards regulations. This letter is an admission of all the material allegations of the complaint. The material facts alleged in the complaint are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Mike Fagan, hereinafter referred to as the respondent, is an individual whose mailing address is Route 1, Box 188A, Morris, Texas 74445.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail that the surety bond maintained to secure the performance of his livestock obligations under the Act was inadequate and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to engage in the business of a market agency, buying livestock on a commission basis, without having and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

Mike Fagan, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of One Thousand Five Hundred Dollars (\$1,500.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[This decision and order became final April 30, 1984—ED]

In Re: R. DAVID WILCOX. P&S Docket No. 6221. Decided February 28, 1984.

Decision by John G. Liebert. Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION BY DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) R. David Wilcox, d/b/a Waynefield Stockyards Co., hereinafter referred to as the respondent, is an individual whose mailing address is R.R. 1, Waynefield, Ohio 45896.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified that the surety bond maintained to secure the performance of his livestock obligations under the Act was terminated, and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent R. David Wilcox, individually or through rate or other device, in connection with his activities Packers and Stockyards Act, shall cease and desist in business in any capacity for which bond is required by the Packers and Stockyards Act, as amended, and the regulations, without filing and maintaining a bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a dealer for a period of time as he complies fully with the Act and the regulations. When respondent is in full compliance with the Act and the regulations, an order will be issued in this regard.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Four Thousand Dollars (\$4,000.00)

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[This decision and order became final April 30, 1984—ED]

In Re: R. DEAN BUTLER. T1P&S DOCKET NO. 6207. DECIDED FEBRUARY 29, 1984.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by an amended complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the amended complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the amended complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the amended complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) R. Dean Butler, hereinafter referred to as the respondent, is an individual whose mailing address is Route 1, Columbia City, Indiana 46725.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail that the surety bond maintained to secure the performance of his livestock obligations under the Act was terminated, and that if he continued his livestock operations without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to engage in the business of a dealer, buying and selling livestock in commerce, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

3. (a) Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph III of the amended complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

(b) Respondent, in connection with his operations as a dealer, on or about the dates and in the transaction set forth in paragraph III(a) of the amended complaint, and in the transaction set forth in paragraph III(b) of the amended complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of November 8, 1983, there remained \$33,952.24 for such livestock purchases set forth in III(a) and (b) of the amended complaint.

CONCLUSIONS

By reason of the facts found in Finding of Fact 1, respondent has wilfully violated section 312(a) of the Act and sections 201.29 and 201.30 of the regulations (201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent R. Dean Butler, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;
2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation; and
3. Failing to pay, when due, the full purchase price, of livestock purchases.

Respondent is suspended as a registrant under the Act for 120 days and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in the proceeding terminating this suspension, after the expiration of the 120-day period.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *seq.*).

[This decision and order became final April 30, 1984—ED]

*In Re: CORSICA WESTERN STOCKYARDS, INC. DALE VAN WYK, VAN'S
LIVESTOCK, INC. and WILLIS G. MOUTTET.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO CORSICA WESTERN
STOCKYARDS, INC. UPON ADMISSION OF FACTS BY REASONS OF
DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon officers of respondent Corsica Western Stockyards, Inc., by the Hearing Clerk by certified mail. Respondent Corsica Western Stockyards, Inc., was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Corsica Western Stockyards, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent Corsica Western Stockyards, Inc.'s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Corsica Western Stockyards, Inc., hereinafter referred to as respondent Corsica Western, is a corporation organized and existing under the laws of the State of Nebraska, with its principal place of business located at Corsica, South Dakota. Its mailing address is P.O. Box 110, Corsica, South Dakota 57328.

(b) Respondent Corsica Western, at all times material herein, was:

(1) Engaged in the business of conducting and operating the Corsica Western Stockyards, Inc. stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) A market agency within the meaning of and subject to the provisions of the Act.

2. (a) Respondent Corsica Western's current liabilities exceeded its current assets as of February 28, 1982. As of said date, respondent Corsica Western had current liabilities in the amount of \$507,102.13, and current assets in the amount of \$383,497.56, resulting in an excess of current liabilities over current assets of \$123,604.57.

(b) Respondent Corsica Western's current liabilities exceeded its current assets as of March 12, 1982. As of said date, respondent Corsica Western had current liabilities in the amount of \$527,585.53,* and current assets in the amount of \$385,517.28, resulting in an excess of current liabilities over current assets of \$142,068.25.

(c) Respondent Corsica Western's current liabilities presently exceed its present assets.

3. During the period from February 28, 1982, through March 12, 1982, respondent Corsica Western operated as a market agency selling livestock on a commission basis notwithstanding the fact that during said period of time, respondent Corsica Western's current liabilities exceeded its current assets.

4. Respondent Corsica Western, during the period from November 30, 1981, through March 12, 1982, failed to maintain and use properly its Custodial Account for Shippers' Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the owners or consignors of livestock, in that:

(a) As of November 30, 1981, respondent Corsica Western had outstanding checks drawn on its custodial account in the amount of \$132,552.11, and had, to offset such checks, a balance per its bank statement of \$79,084.87, resulting in a deficiency of \$53,467.24 in funds available to pay shippers their proceeds.

(b) As of February 26, 1982, respondent Corsica Western had outstanding checks drawn on its custodial accounts in the amount of \$654,512.98, and had, to offset such checks, a balance per its bank statements in the amount of \$261,890.34, resulting in a deficiency of \$155,797.60 in funds available to pay shippers their proceeds.

(c) As of March 12, 1982, respondent Corsica Western had outstanding checks drawn on its custodial account in the amount of \$419,425.13, and a bank transfer of \$27,000.00, and had, to offset

* ".13" changed to ".53" by the Administrative Law Judge to conform to the allegations of the Complaint.

such checks and bank transfer, a balance per its bank statements in the amount of \$50,245.91, resulting in a deficiency of \$396,179.22 in funds available to pay shippers their proceeds.

(d) Such deficiencies were due, in part, to the use of funds received as proceeds from the sale of livestock sold on a commission basis for purposes other than the payment of lawful marketing charges and the remittance of net proceeds to shippers.

5. (a) Respondent Corsica Western, in connection with its operations as a market agency, on or about the dates and in the transactions set forth in paragraph VII(a) of the complaint, issued checks in purported payment of the net proceeds resulting from the sale of livestock on a commission basis which were returned unpaid by the bank upon which they were drawn because the respondents did not have and maintain sufficient funds on deposit and available in the account to pay such checks when presented.

(b) Respondent Corsica Western, on or about the dates and in the transactions set forth in paragraph VII(a) of the complaint, in connection with its operations as a market agency, sold livestock on a commission basis and failed to transmit or deliver to the owners or consignors of such livestock, when due, the net proceeds received from the sale of their livestock.

6. Respondent Corsica Western, in connection with its operation subject to the Act, failed to keep accounts, records and memoranda which fully and correctly disclosed all transactions involved in its business in that it failed to keep and maintain (1) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) an accounts receivable journal; and (3) a cash disbursements and receipts journal.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent Corsica Western's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, respondent Corsica Western has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts found in Finding of Fact 4 herein, respondent Corsica Western has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.42 of the regulations (9 CFR § 201.42).

By reason of the facts found in Finding of Fact 5 herein, respondent Corsica Western has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 CFR § 201.43(a)).

By reason of the facts found in Finding of Fact 6 herein, respondent Corsica Western has wilfully violated section 401 of the Act (U.S.C. § 221).

ORDER

Respondent Corsica Western Stockyards, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer subject to the Act while its current liabilities exceed its current assets;
2. Failing to maintain its Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);
3. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;
4. Failing to transmit or deliver to the owners, shippers or consignors of livestock, when due, the net proceeds resulting from the sale of their livestock; and
5. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of its own or for any purposes other than the payment of lawful marketing charges and the remittance of net proceeds to consignors.

Respondent Corsica Western shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business subject to the Act, including (1) a general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) an accounts receivable journal; and (3) a cash receipt and disbursements journal.

Respondent Corsica Western shall not engage in the business of a dealer or market agency subject to the Act for a period of two (2) years from the effective date of this order.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 et seq.).

[This decision and order became final April 30, 1984—ED]

MISCELLANEOUS ORDERS

*In Re: TOMMIE TURNER, JR., INC. and TOMMIE TURNER, JR. P&S
Docket No. 6226. Decided March 7, 1984.*

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 3, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended the corporate respondent as a registrant under the Act until such time as it complied fully with the bonding requirements under the Act and the regulations.

Complainant has now received information that the corporate respondent is in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 3, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In Re: MODESTO MEDICAN. P&S Docket No. 5762. Decided March 12, 1984.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 6, 1980, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Complainant has now determined that respondent is in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued November 6, 1980, is terminated. The order shall remain in full force and effect in all other respects.

In Re: JOHN P. McGRAW. P&S Docket No. 6244. Decided March 1, 1984.

Decision by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 1, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended the respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Complainant has now received information that the respondent is in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 1, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In Re: FRANCIS W. CAUGHMAN JR. d/b/a FRANKIE CAUGHMAN CATTLE Co. P&S Docket No. 5661. Decided April 24, 1984.

Decision by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 18, 1979, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Complainant has received information that respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 18, 1979, is terminated. The order shall remain in full force and effect in all other respects.

In Re: BILLY REX CODY. P&S Docket No. 6255. Decided April 2, 1984.

Decision by Dorothea A. Baker, Administrative Law Judge.

ORDER OF DISMISSAL

Pursuant to the motion of complainant and it appearing that the respondent is deceased,

IT IS HEREBY ORDERED that the complaint is dismissed.

*In Re: FRANCIS W. CAUGHMAN JR. d/b/a FRANKIE CAUGHMAN
CATTLE Co. P&S Docket No. 5814. Decided April 26, 1984.*

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On January 8, 1981, an order was issued in the above-captioned matter which, *inter alia*, suspended the respondent as a registrant under the Act for a period of 45 days and thereafter until he demonstrated that he was no longer insolvent.

Respondent has now demonstrated his solvency, and has served the 45-day period of suspension. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued January 8, 1981, is terminated. The order shall remain in full force and effect in all other respects.

*In Re: MICHAEL CLAUDE EVANS, P&S Docket No. 6271. Decided
April 27, 1984.*

Decision by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On April 23, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended the respondent as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations.

A surety bond has been filed and the respondent is now in full compliance with the bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 23, 1984, is terminated. The order shall remain in effect in all other respects.

REPARATION DECISIONS

*In Re: KUHN FARMS v. PRODUCERS COMMISSION ASSOCIATION. P&S
Docket No. 6024. Decided March 27, 1984.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), begun by a complaint filed on February 10, 1982, alleging in substance sale of consigned livestock in violation of the consignor's instructions. The amount claimed was \$2,000.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on April 5, 1982. A copy of the investigation report was served on complainant on the same day. Respondent timely filed an answer which was promptly served on complainant. Complainant requested an oral hearing.

An oral hearing was held in Sioux City, Iowa, on September 9, 1982 before Joanne Schwartz of the Office of the General Counsel of this Department. Complainant was represented by Glenn C. Metcalf, Esq., Moline, Iowa. Respondent was represented by Wiley Mayne, Esq., Sioux City. Ten witnesses testified; 23 exhibits were received. Thereafter briefs were filed on behalf of complainant and respondent.

The complaint also named as a respondent the Sioux City Stockyards Company, which was represented at the hearing by Paul D. Lundberg, Esq., Sioux City. The complaint was withdrawn as to that respondent at the hearing (Tr. 119-21).

The following is undisputed. Complainant consigned certain hogs to respondent for sale on commission. The hogs came from two separate pens on complainant's farm and complainant for reasons of his own wanted the hogs from each pen sold separately. Respondent commingled and sold all of them in a single lot. There is no dispute as to whether respondent's action was in accord with its general duty (unless instructed otherwise) to obtain the best price obtainable for the hogs, and no dispute about certain sows which went with them.

It is further undisputed that there was no direct communication between complainant and respondent before the sale, and that the action taken by complainant to communicate his wishes to respondent was to fill out separate "truck tickets" for the two lots of hogs, keep them separate on the truck which transported them to the

Sioux City Stockyards, and have the driving agency at the Stockyards place the two lots of hogs in two separate pens assigned to respondent.

Thus on the morning of the sale respondent's personnel found complainant's two sets of hogs in two separate pens with two separate "truck tickets." The issue is whether this was sufficient communication to respondent of complainant's desire that the two lots of hogs be sold separately. Complainant's witnesses testified convincingly that it was, according to custom at the Stockyards. Respondent's witnesses testified just as convincingly that it was not, also according to custom at the Stockyards. The testimony as to custom at the Stockyards is in direct conflict and irreconcilable. "[I]f the evidence is such that a decision on a point cannot be made one way or the other, the party with the burden of proof loses." *Texas Distrib. v. Local Union No. 100, etc.*, 598 F. 2d 393; 402 (5th Cir., 1979).

Complainant also contended that respondent had a duty to publish instructions as to how a consignor could communicate such wishes with respect to the sale of consigned livestock. Respondent's employees testified convincingly that a phone call, or a "sell separately" notation on a "truck ticket," would have been entirely sufficient. A requirement would have to be more unusual than that before a published instruction would be mandated for it.

This order is the same as an order by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., appendix page 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. § 702-3 and *United States v. ICC*, 337 U.S. 426.

The complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930
Volume 43 Number 2

COURT DECISIONS

No. 82-3826

UNITED STATES COURT OF APPEALS For the Sixth Circuit

Melvin Beene Produce Company, Petitioner, v.
The Agricultural Marketing Service, Respondent.

Petition for Review of an Order of the Secretary of Agriculture.

Decided and Filed February 28, 1984

Before: Kennedy, Martin, and Contie, Circuit Judges.

Kennedy, Circuit Judge. Melvin Beene Produce company (Beene) appeals a revocation of its license under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499 *et. seq.* The Secretary of Agriculture's revocation of Beene's license resulted from a complaint, filed on August 31, 1981, alleging that Beene had violated U.S.C. § 499b(4) by failing to make full and prompt payment to fourteen sellers for some 227 lots of perishable agricultural commodities. The violations had occurred between May 1979 and August 1980. The complaint further alleged that Beene's violations were willful, flagrant, and repeated. The agency sought revocation of Beene's license pursuant to 7 U.S.C. § 499h(a).

The case was heard by an Administrative Law Judge who found that Beene had willfully, flagrantly, and repeatedly violated U.S.C. § 499b(4). Accordingly, she ordered a ninety-day suspension of Beene's PACA license. The agency appealed this decision to a Judicial Officer, who also found that Beene had committed willful, flagrant, and repeated violations of PACA and ordered that its license be revoked. We affirm the Judicial Officer's decision.

Beene makes three arguments on appeal:

(1) The Secretary of Agriculture lacked subject matter jurisdiction to revoke Beene's license because the complaint was untimely.

(2) Revocation of Beene's license in lieu of a ninety-day suspension was inappropriate under the circumstances and constituted an impermissible failure on the Judicial Officer's part to use discretion in dispensing sanctions.

(3) The revocation of its license by an Administrative Law Judge and a Judicial Officer who are not Article III judges is unconstitutional.

All these claims are without merit.

I.

It is uncontested that Beene violated 7 U.S.C. § 499b(4). PACA provides for two different types of suits which may be filed for such a violation. Section 499e provides for a reparations action for dam-

ages incurred by any person injured by virtue of a § 499b violation,¹ while § 499h provides for disciplinary actions brought by the Secretary of Agriculture for such violations.² This action was brought under the latter section.

Section 499f sets out a procedure for complainants of § 499b violations. Section 499f(a) provides:

Any person complaining of any violation of any provision of section 499b of this title by any commission merchant, dealer, or broker may, *at any time within nine months after the cause of action accrues*, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary. (emphasis added)

The complaint in this case was filed more than nine months after the time period during which the violations occurred. The question here is whether this time limit applies to disciplinary actions by the Secretary under § 499h, or only to reparations proceedings under § 499e.

We find that the nine-month limit applies only to reparations actions under § 499e, and that the Secretary did not lack subject matter jurisdiction here. First, the language of § 499f(a) states that any person complaining of § 499b violation may *apply to the Secretary within nine months* after the cause of action accrues. Semantically, the nine-month limit does not apply to actions by the Secretary, only to complaints directed to him. This is borne out by the

¹ Section 499(e) provides, in part:

(a) If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction.

² Section 499(h) provides, in part:

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title...the Secretary may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

fact that all of the cases cited by Beene holding the time limit to be a jurisdictional prerequisite to action by the Secretary of Agriculture under the statute involve § 499e reparations actions, not disciplinary actions by the Secretary.³

We believe that subsection 499f(b), which does not contain a nine-month time limit, supplies the procedure for disciplinary action under § 499h. Subsection 499f(b) states:

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance with the rules and regulations of the Secretary, a complaint of any violation of any provision of this chapter by any commission merchant, dealer, or broker, and may request an investigation of such complaint by the Secretary.

This conclusion is consistent with other language in the statute. Section 499m(b), provides that the Secretary, in order to insure compliance with the prompt payment provision of § 499b(4), "shall from time to time inspect the accounts, records, and memoranda of any commission merchant, dealer, or broker *determined in a formal disciplinary proceeding under § 499f(b) of this title to have violated such provision.*" (emphasis added) The statute thus indicates that the procedure for disciplinary actions is set out in § 499f(b), and not § 499f(a).

A recent decision of the District of Columbia Circuit, *Finer Food Sales Co. v. Block*, 708 2d 774 (D.C. Cir. 1983), supports our view. While *Finer Foods* does not address the precise question of whether the time limit applies to § 499h disciplinary actions, it does hold that another clause of § 499f(a) applies only to reparations proceedings and not to disciplinary actions. The Court examined subsections (a), (b) and (c) of § 499f and concluded:

³ *Cooper v. Caro & Longo Wholesale Produce Co.*, 40 Agric. Dec. 454 (1981); *Be Well Foods Ltd. v. Volley Packing Service International*, 39 Agric. Dec. 1200 (1980); *Maggio, Inc. v. First National Stores, Inc.*, 39 Agric. Dec. 1179 (1980); *Kaplan's Fruit & Produce Co. v. Jim Weatherford Co.*, 37 Agric. Dec. 812 (1978), holding that the Secretary of Agriculture had no subject matter jurisdiction to revoke its PACA license, are all actions by sellers for reparations.

We find additional support in the margin notation to section 6(a), Perishable Agricultural Commodities Act, ch. 436, 46 Stat. 531 (1930). This was the original enacted version of PACA 7 U.S.C. § 499f(a), and is identical to the present provision. The margin notation reads:

Complaint and investigation.

Petition of *individual complainant* to the Secretary. (Emphasis added.)

These subsections do not expressly state which of them applies to reparations proceedings, which to disciplinary proceedings, and which to both. Analysis of their language and structure, however, indicates that the requirement in [§ 499f(a)] for the filing and serving upon the licensee of an informal complaint of a third person . . . applies only in reparations proceedings and not in disciplinary proceedings.

Id. at 780.

Beene argues that if the nine-month time limit were read not to apply to disciplinary actions by the Secretary, then there would be no statute of limitations on the Secretary's disciplinary power. We see no serious problems with this situation. The doctrine of laches does apply to the Secretary. Moreover, this is not the only instance in which Congress has chosen not to put a statutory time limit on the Secretary of Agriculture's disciplinary power. *See, e.g., Packers and Stockyards Act of 1921*, 7 U.S.C. § 181 *et seq.*⁴ The statute itself and the case law point to our conclusion that the nine-month time limit does not apply to actions by the Secretary under § 499.

II.

Beene next argues that revocation of its license was inappropriate under the circumstances. It argues that the Judicial Officer impermissibly refused to exercise discretion in dispensing Beene's sanction, that the Judicial Officer was in error in this and should have used his discretion not to revoke Beene's license. We disagree.

The choice of sanctions imposed by the Secretary of Agriculture through his Judicial Officer may not be overturned unless it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 185-86 (1973); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373 (5th cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981). This is not the case here.

Beene misreads the Judicial Officer's opinion. Beene in its brief quotes portions of the Judicial Officer's opinion as support for its contention that the Judicial Officer refused to exercise any discretion in imposing a sanction. However, the Judicial Officer says only that he has no discretion to consider mitigating circumstances in deciding whether Beene violated PACA, and whether it did so will-

⁴ 7 U.S.C. § 193(a) gives the Secretary the power to require a packer to attend and testify at a hearing "[w]henever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter . . ." The Secretary may assess a penalty of up to \$10,000 for each violation, pursuant to 7 U.S.C. § 193(b).

fully. He does not address the question of discretion in dispensing sanctions.

The Secretary is authorized, under 7 U.S.C. § 499h(a), to revoke a PACA license for flagrant or repeated violations of § 499b. Beene's Administrative Law Judge and the Judicial Officer found that Beene had committed such violations, and Beene does not challenge this on appeal. Beene went into bankruptcy after failing to pay for the 227 lots of perishable produce. This does not, however, have any effect on the Secretary's power to revoke Beene's license. As the Judicial Officer explains at length, Congress specifically amended § 525⁵ of the 1978 Bankruptcy Law in order to authorize the continuation of the Secretary's license revocation authority under PACA when the violations involve debts dischargeable in bankruptcy.

Far from denying that he had discretion regarding the revocation, the Judicial Officer carefully examined the evidence that Beene put forward as justification for a more lenient penalty. Beene presented unsworn petitions by five of its fourteen producers and sellers, asking for leniency for Beene. The Judicial Officer found that the petitions had no probative value, first, because they were unsworn, and second, because Beene's creditors had an interest in Beene's staying in business, hoping that it would eventually be able to make full payment. Beene presented no testimony or evidence of mitigating circumstances. The Judicial Officer justified the revocation of Beene's license saying: "If lenient sanctions were imposed in the case of serious and flagrant violations of the Act, the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a course would be contrary to the public interest."

III.

Appellant also urges that the administrative mechanism for dispute resolution between a licensee and its creditors in which a money judgment may be entered against the licensee for unpaid sums is an unconstitutional exercise of judicial power. Relying upon *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 67 (1982), Beene argues that the right to recover costs

⁵ The section provides in pertinent part:

Except as provided in the Perishable Agricultural Commodities Act, 7 U.S.C. 499a-499s) . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . [to] a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . ."

¹¹ 7 U.S.C. § 525 (emphasis added). For a discussion of the rationale for this provision for PACA, see 123 Cong. Rec. 35,671-72 (1977).

damages is a state-created private right which can only be enforced in an Article III court. However, we are concerned here only with a public right controversy, whether Beene's license should be revoked. The Supreme court in *Marathon* specifically recognized licenses as examples of public rights which are within the province of administrative agencies without violating Article III.

The Judicial Officer's revocation was not unwarranted in law or without justification in fact, and therefore cannot be overturned. Accordingly, the judgement of the Judicial Officer revoking Beene's license is affirmed.

(No. 20,784)

In re: C.B. Foods, Inc. PACA Docket No. 2-5544. Decided July 13, 1981

Failure to make full payment promptly—Publication of the facts

Respondent's failure to make full payment promptly for numerous transactions constitutes repeated and flagrant violations of the Act. The facts and circumstances set forth shall be published.

John A. Campbell, Administrative Law Judge.

Andrew Y. Stanton, for complainant.

Russell J. Ober, Jr., Pittsburgh, Pa., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Chief Administrative Law Judge John A. Campbell filed an initial decision and order on May 12, 1981, finding that respondent has committed repeated, flagrant and wilful violations of § 2(4) of the Act (7 U.S.C. § 499b(4)).

On June 4, 1981, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35). * On June 24, 1981, the Hearing Clerk referred the case to the Judicial Officer for decision.

* The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The present Judicial Officer was appointed in January 1971, having been involved with the Department's

Continued

Oral argument before the Judicial officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues raised on appeal are squarely covered by prior precedents.

Upon a careful consideration of the record in this proceeding, Chief Judge Campbell's initial decision is adopted herein, followed by additional conclusions by the Judicial Officer. The final order is identical to Chief Judge Campbell's order, except that the effective date has been changed in view of the appeal.

ADMINISTRATIVE LAW JUDGE'S DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) (hereinafter referred to as the "Act" or "PACA"). A complaint was filed on January 25, 1980, against the respondent, C.B. Foods, Inc. The complaint alleged that respondent violated Section 2(4) of the Act (7 U.S.C. 499b(4)) by its failure to make full payment promptly for 293 lots of perishable agricultural commodities sold to respondent by 13 sellers from September 1978 through February 1979, for a total amount of \$215,822.82.

The complaint further alleged: that the failure to pay constituted willful, flagrant, and repeated violations of the Act; that respondent filed a voluntary petition in bankruptcy in the United States District Court for the Western District of Pennsylvania on February 26, 1979; and that respondent's license terminated on October 30, 1979, when respondent failed to pay the required license fee. The complaint requested that a finding be issued that respondent had committed willful, flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4)), and that such finding be published.

Respondent filed an answer on February 19, 1980, in which it admitted its corporate status, its address, its petition for bankruptcy, and the termination of its PACA license. The answer further admitted the purchase of commodities from sellers identified in the complaint, but neither admitted nor denied the transactions specified in the complaint because of a lack of records. In addition, respondent denied violating the Act.

On January 22, 1981, an amended answer was filed which incorporated the original answer and asserted additional defenses. It as-

regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer, and 8 years as administrator of the Packers and Stockyards Act regulatory program).

serted: that the Act is unconstitutional as it relates to licensees who have been adjudicated or discharged as a bankrupt, and persons responsibly connected to such licensees; that the complaint fails to state a claim upon which relief may be granted; that respondent and its responsibly connected individuals at all times acted in good faith; and that the Secretary "is without jurisdiction to adjudicate claims arising out of the transactions set forth in the complaint."

An oral hearing was held on February 11, 1981, at Pittsburgh, Pennsylvania. Mr. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented complainant. Mr. Russell J. Ober, Jr., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, represented respondent.

Prior to the hearing, the parties stipulated as follows concerning the transactions: (1) That respondent had purchased, received and accepted 114 of the 293 lots of perishable agricultural commodities alleged in the complaint, and had failed to make full payment promptly for them; (2) that the perishable agricultural commodities involved in these 114 lots were purchased by respondent from 12 sellers located within the State of Pennsylvania; (3) that respondent had no intent to ship such commodities, nor were such commodities shipped or processed for shipment outside Pennsylvania; and (4) that the 12 sellers received such commodities from sources outside Pennsylvania. These 114 transactions occurred from January 1979 through February 1979. The amount which respondent failed to pay in connection with the 114 stipulated transactions was \$34,017.15.

At the hearing, complainant introduced testimony by three sellers, establishing that respondent had purchased, received, and accepted from them, in addition to the transactions stipulated, another 108 lots of perishable agricultural commodities, with two sellers requiring payment to be made the Wednesday following the week during which the purchases were made, and the third seller requiring payment up to two weeks from the date of sale. Their testimony established, however, that respondent failed to pay the agreed purchase prices for these 108 lots, totalling \$145,879.89. Testimony also established that the three sellers had purchased these commodities from sources outside the State of Pennsylvania.

FINDINGS OF FACT

1. Respondent, C. B. Foods, Inc. is a corporation whose address is 21st & Smallman Street, Pittsburgh, Pennsylvania 15222. Pursuant to the licensing provisions of the Act License No. 730498 was issued to respondent on October 30, 1972. This license was renewed annu-

ally but terminated on October 30, 1979, pursuant to section 4(a) of the Act (7 U.S.C. 499d(a)), when respondent failed to pay the required annual license fee.

2. During the period January 1979 through February 1979, respondent purchased, received and accepted 222 lots of perishable agricultural commodities from 12 sellers for which respondent failed to make payment of the agreed purchase prices in the total amount of \$179,897.04.

3. All of the agricultural commodities acquired by C. B. Foods in connection with the aforesaid 222 transactions were purchased by it from firms located in Allegheny County, Pennsylvania, and were delivered to C. B. Foods' warehouse in Allegheny County, Pennsylvania, without traveling from, through or to any other state.

4. All of the agricultural commodities acquired by C. B. Foods in connection with the aforesaid 222 transactions to which C. B. Foods was a party were previously shipped from states other than Pennsylvania; they were ultimately shipped into Pennsylvania to the facilities of the firms which sold them to C. B. Foods.

5. None of the agricultural commodities acquired by C. B. Foods in connection with the 114 transactions, to which counsel for the parties stipulated, were purchased by C. B. Foods for the purpose of either shipment to another state or for processing within Pennsylvania and for shipment outside of Pennsylvania of the products resulting from such processing. (Tr. 56-57).

6. Prior to 1972, Frank Catanzaro and Sons, a buying broker, serviced 6 or 7 Shop and Save Stores, an independent chain of stores sponsored by a firm called Charley Brothers. A representative of Charley Brothers approached the Catanzaro broker company and suggested that service be expanded to all of the Shop and Save Stores or lose the account for the 7 stores. And so in 1972, the respondent corporation began its existence (separate and apart from the broker enterprise); its purpose was to warehouse and wholesale produce to the Shop and Save chain of stores.

The initial investment in the respondent corporation was \$5,000. Credit was extended and respondent's wholesale business expanded, with Charley Brothers accounting for 90%. In the last 2 or 3 years of its affiliation with Charley Brothers, the respondent's business amounted to 12 million dollars per year.

Sometime in 1977, respondent was informed by Charley Brothers that it would open its own warehouse and terminate its business relationship with respondent. A year later, respondent lost the Charley Brothers account. Respondent remained in operation for another year, but with ever increasing financial problems. Respondent borrowed approximately \$225,000 from members of the

Catanzaro family to keep the business going, but the effort was not successful.

7. On Friday, February 16, 1979, a three day meeting began at respondent's office between representatives of respondent and representatives of three suppliers of produce to respondent—De Masse and Manna Company, Gullo Produce, and Consumers Produce Company, Inc. After review of respondent's accounts and records it was determined that the three suppliers could no longer extend credit and supply produce to respondent. Respondent's business terminated and on February 26, 1979, respondent filed a voluntary petition in Bankruptcy in the United States District Court for the Western District of Pennsylvania (Bankruptcy No. 79-135).

8. In March of 1979, complainant was notified by its regional office that respondent had filed its bankruptcy petition. After receipt of the Bankruptcy schedule of creditors from the Court, complainant began an investigation to determine if the Act had been violated.

PERTINENT STATUTORY PROVISIONS

Section 1 (8)

Definitions:

When used in this chapter—

* * * * *

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. 7 U.S.C.A. 499a (8)

Section 2 (4)

Unfair conduct:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * *

the expectation that they will end their transit, after purchase, in another—.”

In *DEKLE BROKERAGE CO. v. TATUM*, 19 A.D. 521, 523 (1960), the Judicial Officer construing the interstate commerce provisions of the Act held:

“The sale of produce by one dealer to another dealer, in the same state, is a transaction in interstate commerce if the produce was received by the seller from outside that state prior to the sale. *Gilliland & Company v. San Antonio Commission Company*, 2 A.D. 492; *John Mercurio v. Estes Market*, 7 A.D. 1000; *P. & T. H. Garber, Inc. v. Delia & Cucinotti*, 10 A.D. 238; and *Sunshine Packing Corp. v. K. B. Frosted Foods Co.*, 16 A.D. 574.”

In a more recent decision involving the denial of an application for license, *In re: Benny Davila*, 36 A.D. 696, 703 (1977) the Judicial Officer held:

“Under the facts that were developed at the hearing, after the lapse of his license, respondent continued to obtain fruits and vegetables grown outside the State of Texas for his Texas accounts by either purchasing them from other produce companies (such as Alex’s Produce) or by obtaining them through a fruit and vegetable broker (such as Willson Davis Company). The commodities included, by way of example, Washington pears, Idaho potatoes and produce from California, Arizona and Florida. Despite the fact that the orders for out-of-state produce were given by intermediaries, respondent continued to act in the capacity of a dealer. Additionally, on those occasions when Willson Davis acted as his broker, respondent was the first recipient in Texas of the interstate shipments. Under these circumstances, respondent was buying and selling perishable agricultural commodities “normally in such current of commerce” and was required by the Act to have a license.”

Respondent cites several reparation decisions in which an opposite conclusion seems to be reached. However, it appears from a reading of such cases that there was a failure to prove any movement of commodities in interstate commerce.

“Under the act, the jurisdiction of the Secretary depends upon proof that, among other things, the contested transaction involved interstate or foreign commerce, or was made in contemplation thereof. *P. C. Kellam v. Virginia Tomato Corporation*, 29 A.D. 835 (1970). A review of the evidence in the record leads us to the conclusion that the

transaction, herein, did not involve interstate commerce nor did it involve the contemplation thereof.

* * * * *

While the fact that the transaction was on a transfer in storage basis does not preclude the existence of interstate commerce, it does tend to support respondent's challenge to the existence of interstate commerce in the absence of evidence to the contrary. Although given the opportunity, *complainant failed to offer any evidence* that the terms of the sale negotiated with Imperial Frozen Foods involved any contemplation of movement of the peas in interstate commerce or any evidence *that the peas were ever actually moved in interstate commerce*. The fact that the buyer, Imperial Frozen Foods, is a New York company and the peas are in Oregon is of no significance without a showing of interstate commerce. *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (1937). There is no evidence in the record which establishes that the peas moved in or that the sale was negotiated in contemplation of movement in interstate commerce. (Emphasis added). *Wide World of Foods v. Trinity Val. Foods Co.*, 34 A.D. 423, 425-426 (1975)

In this case, there was movement of the commodities in interstate commerce. Consequently, the Secretary has jurisdiction.

2. The record in this proceeding demonstrates that respondent is indebted to sellers for 222 lots of perishable agricultural commodities in the amount of \$179,897.04. This failure to pay is clearly in violation of the prohibitions of section 2 of the Act. *Atlantic Produce*, 35 A.D. 1631, 1639 (1976), *aff'd.*, 568 F.2d 772 (CA 4, 1978), *cert. den.*, 439 U.S. 819 (1978). The failure to pay for 222 separate transactions constitutes flagrant and repeated violations of the Act. *G. Steinberg & Son*, 32 A.D. 236, 243-244 (1973), *aff'd sub nom.*, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (CA 2, 1975) *cert. den.*, 419 U.S. 830; *J. H. Norman & Sons Distributing Co.*, 37 A.D. 705.

The Judicial Officer has ruled on numerous occasions that such violations as were committed by respondent were flagrant and repeated. These rulings have also been upheld by the reviewing courts. *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (CA 2, 1974) and *Zwisch v. Freeman*, 373 F.2d 110, 115 (CA 2 (1967), *cert. den.*, 389 U.S. 835 (1967).

In addition, it has been held that PACA disciplinary matters are not subordinate to bankruptcy proceedings, and both may proceed independently. *In re The Zeitzer Food Corp., Inc.*, 36 A.D. 1430,

1441-4 (1977); *Zwick v. Freeman*, 373 F.2d 110, 114-117 (CA 2 1966) cert. denied 389 US 835.²

4. Complainant seeks a finding that respondent committed willful, flagrant, and repeated violations of the Act and that such finding be published.

The testimony at the hearing and case precedent make clear that a finding³ of willful, flagrant, and repeated violations of section 2 (4) of the Act, and publication thereof, is the appropriate sanction to be imposed. That respondent has filed a petition in bankruptcy is irrelevant to the issuance of a sanction, as the institution of bankruptcy proceedings has no effect on the operation of the Act as it pertains to the disciplinary action involved herein. Finally, even if respondent has serious financial difficulties, such difficulties resulted from business practices which do not warrant mitigation of complainant's requested sanction.

ADDITIONAL CONCLUSIONS BY JUDICIAL OFFICER

The provisions of the Perishable Agricultural Commodities Act as to interstate commerce (7 U.S.C. § 499a(3), (8)) are virtually identical to the provisions of the Packers and Stockyards Act (7 U.S.C. §§ 182 (6), 189)). It has been held under both Acts that the statutory provisions apply the familiar current of commerce concept under which intrastate transactions that are interwoven with the current of interstate commerce are "in commerce."⁴ Since all of the agri-

² At page 3 of its brief, respondent states:

"In this memorandum the respondent will not address the issue of the constitutionality of the Act as it relates to licensees adjudicated or discharged as bankrupt in recognition of the principle that a federal agency may not declare an Act which it is charged with enforcing to be unconstitutional."

³ Among the factors not considered here is the effect of such a finding on those responsibly connected with the respondent corporation. Such a factor is not material or relevant to this proceeding. *In re: Baltimore Tomato Company, Inc.*, 39 A.D. 412, 415-416 (1980)

⁴ As to the Perishable Agricultural Commodities Act, see *Krueger v. Acme Fruit Co.*, 75 F.2d 67, 67-68 (5th Cir. 1935); *Consolidated Citrus Co. v. Goldstein*, 214 F. Supp. 823, 824-26 (E.D. Pa. 1963); *Jackson v. Harrisburg Daily Market, Inc.*, 198 F. Supp. 490, 491-92 (M.D. Pa. 1961); *United States v. Klein*, 145 F. Supp. 442, 442-43 (D.N.J. 1956); *United States v. Solomon*, 3 F.R.D. 411, 413 (E.D. Ill. 1944). As to the Packers and Stockyards Act, see *Stafford v. Wallace*, 258 U.S. 495, 515-28 (1922 *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1339-40 (8th Cir. 1971); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 955-56 (D.C. Cir. 1956); *Trunz Park Stores, Inc. v. Wallace*, 70 F.2d 688, 689 (2d Cir. 1934); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 224-26 (N.D. Cal. 1969); *United States v. Tyson's Poultry, Inc.*, 216 F. Supp. 53, 61-62 (W.D. Ark.), appeal dismissed by appellant, 319 F.2d 860 (8th Cir. 1963).

cultural commodities involved in this case were shipped into Pennsylvania from other states to the firms which sold them to respondent, a wholesaler, all of the agricultural commodities were still in the current of interstate commerce when purchased by respondent.

Respondent's violations were clearly wilful, as that term is used in regulatory statutes. *In re Shatkin*, 34 Agric. Dec. 296, 297-3 (1975). But even if respondent's violations were not wilful, it would be of no consequence in this case. The Act does not refer to wilful violations, and the deletion of the word wilful from the order in this case would have no effect whatever on respondent or on those responsibly connected with respondent. Since this case does not involve the suspension or revocation of a license, a finding can be made that the respondent has committed flagrant or repeated violations of § 2 of the Act without first sending a warning letter irrespective of whether the violations were wilful,⁵ or the license has terminated.⁶

ORDER

The respondent has committed repeated, flagrant and wilful violations of § 2 (4) of the Act (7 U.S.C. § 499b (4)). The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

This order shall be effective on the 30th day after service on the respondent.

⁵ *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1256 n. 1 (5th Cir. 1975); *In re Kafcsak*, 39 Agric. Dec. 683, 685-87 (1980), appeal docketed, No. 80-3406 (6th Cir. June 26, 1980); accord, *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 262-63 (1973), *aff'd*, 491 F.2d 988, 993-94 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

⁶ *Quinn v. Butz*, 510 F.2d 743, 750 (D.C. Cir. 1975); *In re Kafcsak*, 39 Agric. Dec. 683, 685-87 (1980), appeal docketed, No. 80-3406 (6th Cir. June 26, 1980); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 243-45 261-63, 270 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

DISCIPLINARY DECISIONS

In Re: OREN HALL d/b/a TRI STAR PRODUCE Co. PACA Docket No. 2-6-398. Decided January 30, 1984.

Application for PACA license denied—Decision.

Respondent having been convicted of several felonies, and incarcerated had also been ordered on four occasions to make reparation on several PACA violations. Respondent did not comply with the orders, while on parole respondent again violated the PACA. The complainant has provided enough information to substantiate it's denial of a license to the Respondent.

Edward M. Silverstein, for complaint.
Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is a Notice to Show Cause proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter called the "Act" or "PACA"), the regulations promulgated pursuant to the Act (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 through 1.151; hereinafter called the "Rules of Practice"). The proceeding was instituted by a Notice to Show Cause filed on September 19, 1983, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged, in the Notice to Show Cause that Oren Ray Hall, d/b/a Tri Star Produce Co., is unfit for the issuance of a PACA license because of his prior PACA violations, and because he had been convicted of committing felonies.

An oral hearing was held on October 13, 1983, in Chattanooga, Tennessee. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by Robert A. Frazier, Esq., 210 Pioneer Bank Building, Chattanooga, Tennessee 37402. At the close of the hearing, the time was fixed for the filing of briefs.

PERTINENT STATUTORY PROVISIONS

Sec. 2 (7 USC 499b)

It shall be unlawful in or in connection with any action in interstate or foreign commerce—

* * * * *

(4) For any commission merchant, dealer, or broker who makes, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought or sold, or consigned, in such commerce by such dealer, or purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

Sec. 3 (7 USC 499c)

(a) After the expiration of six months after the approval of this Act no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time.

Sec. 4 (7 USC 499d)

(a) Whenever an applicant has paid the prescribed fee to the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: * * *

(b) * * *

(c) * * *

(d) The Secretary may withhold the issuance of a license to an applicant for a period not to exceed thirty days pending an investigation for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer

cer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Sec. 7 (7 USC 499g)

(a) * * *

(b) * * *

(c) * * *

(d) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within 5 days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on the appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten

days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

Sec. 8 (7 USC 499h)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14 (b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) * * *

(c) * * *

(d) In addition to being subject to the penalties provided by Section 3 (a) of this Act, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business, without a valid or effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

PERTINENT REGULATIONS CFR PART 46

Sec. 46.2 (aa).

'Full payment promptly' is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. 'Full payment promptly,' for the purpose of determining violations of the means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * *

FINDINGS OF FACT

Respondent Oren Ray Hall is an individual, who proposes to do business as Tri Star Produce Co., at 4002 Dodds Avenue, and whose mailing address is P. O. Box 2764, Chattanooga, Tennessee 37407.

Pursuant to the licensing provisions of the Act, Michael Wallace, an individual doing business as Wallace Produce Co., whose mailing address was P. O. Box 2612, Chattanooga, Tennessee, was issued license number 741209 on February 12, 1974. This license was annulled, pursuant to Section 4(a) of the PACA (7 U.S.C. 499 (a)), on February 12, 1975, when the firm failed to pay the required annual fee. A subsequent investigation of this firm's activities, however, revealed that the firm was solely owned and operated by Respondent. Respondent, on November 13, 1975, consented to an injunction against him for violation of Section 3 of the Act, (operating without a license) in a civil action designated as No. 1-75-155, brought in the United States District Court for the Eastern District of Tennessee, Southern Division.

Respondent failed to pay four reparation awards which were levied against him, jointly and severally with Michael Wallace d/b/a Wallace Produce Co., in January 1975, pursuant to Section 7 of the Act. The details of these awards are:

ACA DOCKET NO.	CITATION	DATE OF AWARD	AMOUNT OF AWARD
64.....	34 A. D. 189.....	1-08-75	\$8,860.00
65.....	34 A. D. 189.....	1-09-75	\$8,759.48
66.....	34 A. D. 192.....	1-09-75	\$7,305.90
61.....	34 A. D. 189.....	1-27-75	\$18,779.50

In a default decision and order issued on December 4, 1975, 35 U.S.C. 21, respondent was found to have committed willful, repeated, and flagrant violations of section 2 of the Act. Specifically, respondent failed to pay ten sellers a total of \$109,034.20 for 36 shipments of fruits and vegetables, all being perishable agricultural commodities, shipped in interstate commerce, which he purchased, received, and accepted during the period March 1974 through August 1974.

On or about April 1, 1968, Respondent was arrested and charged with interstate transportation of forged securities, a felony. Respondent was convicted and served 21 months at the United States Penitentiary, Atlanta, Georgia. Respondent was released December 21, 1970, on parole effective through March 28, 1972.

1976. It was during this period of parole that the violations occurred as noted in Findings 2, 3, and 4, above.

6. On or about April 13, 1978, Respondent was arrested and charged with conspiracy to commit arson and attempted arson, both felonies.

7. On or about April 18, 1979, Respondent was arrested and charged with mail fraud, a felony.

8. Respondent was convicted of the charges set forth in Findings 6 and 7, and served four years and one month in the United States Penitentiary, Atlanta, Georgia, and the Federal Correctional Institution, Englewood, Colorado. Respondent then served three months in a halfway house in Chattanooga, Tennessee, until September 2, 1983. He was then released and once more is on parole which is in effect through 1997.

CONCLUSIONS

Respondent's violations of the Act and his felony convictions demonstrate a lack of fitness on the part of respondent to engage in the business of a commission merchant, dealer, or broker licensed pursuant to the Act.

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. Enforcement of the Act is effectuated through a system of licensing with penalties for violation. Complementary to this enforcement scheme, the Secretary is provided the authority to refuse to issue a license to an applicant who is a convicted felon, or who has committed the kind of acts which are prohibited under the PACA.

As is noted above, this is a Notice to Show Cause proceeding arising from the Secretary's initial denial of a PACA license to respondent. Because of this initial denial, respondent was given the opportunity to show cause why his application should not be denied. The burden of proof in such proceedings initially falls upon the complainant who must demonstrate good reason why the license application is being challenged. However, once the complainant has provided such good reason, the burden of proof shifts to the applicant (denoted respondent in this type of proceeding) to show cause why his application should be granted. In re: *Pappas Produce*, 36 A.D. 684, 692 (1977).

In the instant proceeding, the complainant's evidence established substantial reasons why the respondent's license should be denied. Respondent several times was convicted of committing felonies. He

also has a record of past PACA violations of all types, i.e., violations of sections 3, 7 and 8 of the Act, (7 U.S.C. §§ 499c, g and h).

Respondent did not refute any of complainant's evidence. In his defense, he presented three witnesses and, in addition, he testified on his own behalf. Respondent's first witness was presented as a "character" witness. Presumably he was to testify as to respondent's "good character." However, he admitted on cross-examination (transcript pages 42-45) that: he was not familiar with the requirements of the PACA, was not familiar with the financial requirements on PACA licensees, did not know what respondent's financial status was, did not know that respondent had been convicted of a felony in 1968, was not aware of respondent's absence during the periods of time respondent was in jail, and only knew respondent from the occasional purchases he made from respondent on the Chattanooga produce market. Obviously, this witness had no personal knowledge of respondent's character.

Respondent's second witness was his Probation Officer. He testified that currently he was respondent's Probation Officer, and also had been his probation officer during the period of time when respondent was on parole after his first felony conviction. It was during this first period of parole that respondent committed a series of PACA violations, *viz.*, operating without a license, failing to pay four reparation awards, and failing to make timely payment for 36 lots of produce purchased, received and accepted in interstate commerce, in the total amount of \$109,034.20. The witness testified candidly that he was not in a position to ensure that respondent would not violate the PACA. (Tr. pages 50-53). He further testified that respondent could be rehabilitated just as easily in another industry, or by working for someone who could take responsibility for his activities in the produce industry. (Tr. pages 53-54).

Respondent, also, testified on his own behalf. His testimony consisted primarily of his claims that he was an exemplary prisoner while incarcerated, and that he would not violate the PACA again.

Further, the brief filed by respondent argues, among other things, that: (1) his association with the Wallace Produce Company (Finding of Fact 2) should have no bearing on his license application; and (2) other persons with past convictions hold licenses.

These arguments are not persuasive.

While we would not hesitate to agree that respondent led an exemplary life while incarcerated, his second period of parole has just begun, and in the light of his violations during the previous period of parole, we are hesitant to say at this time, that he now is fit to hold a PACA license. In short, respondent has offered no probative

evidence of his present fitness to support his application for PACA license.

Mr. James R. Frazier testified on behalf of the complainant. I testified that based on respondent's record (respondent's criminal record as well as respondent's record involving violations of the PACA), the Secretary was not in a position to attest to the industry that respondent would not again violate the Act. He further testified that the industry accepts the issuance of a license by the Secretary as an attestation that the applicant, if licensed, would comply with the Act and with the Regulations issued pursuant to it.

For the foregoing reasons, it is concluded that respondent has failed to sustain his burden of proving that he should be issued PACA license. His application should therefore be denied.

ORDER

Respondent's application for a PACA license is denied.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final March 10, 1984—ED]

In Re: FANFARE FRUIT. PACA Docket No. 2-6395. Decided March 16, 1984.

Failure to make full payment—failure to make payment.

Respondent admitted all of the material allegations of the complaint including the allegations with regard to its indebtedness. Respondent contends that filing for bankruptcy after failure to pay removes jurisdiction from this forum. Judicial Officer ruled that respondent's bankruptcy is no defense to PACA disciplinary action.

Edward M. Silverstein, for complainant.

Henry Freidman, Boston Massachusetts, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*, hereinafter referred to as the "PACA" or the "Act"), instituted by a complaint filed on September 13, 1983, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during the period October 1981 through April 1982, Respondent purchased from 11 sellers, and accepted in interstate commerce, 333 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$229,606.66. Complainant further alleged that such actions were willful, flagrant and/or repeated violations of section 2 of the Act, and requested that the facts and circumstances of such violations be published.

On October 18, 1983, Respondent filed an answer to the complaint. In the answer, Respondent admitted all of the material allegations of the complaint including the allegations with regard to its indebtedness of \$229,606.66 to the eleven sellers for 333 lots of produce. However, as its defense, Respondent claimed that it did no business in interstate commerce, and that this forum lacks jurisdiction because of the bankruptcy proceeding.

Complainant subsequently moved for a decision on the pleadings (December 21, 1983), accompanied by a memorandum of points and authorities.

Respondent's only response to the Complainant's motion and request, was a request for a hearing.

During a pre-hearing telephone conference on February 2, 1984, with counsel for the parties, Complainant's motion was denied and a hearing was scheduled to begin on May 17, 1984.

Thereafter, on February 27, 1984, Complainant renewed its motion for a decision on the pleadings, with an expanded memorandum of points and authorities and attachments bearing on the two defenses asserted by Respondent in its answer. Respondent filed an objection to the renewed motion for decision on March 12, 1984.

Further on February 28, 1984, the Court of Appeals, Sixth Circuit issued its opinion in *Melvin Beene Produce Co. v. The Agricul-*

tural Marketing Service,¹ affirming a ruling by the Department's Judicial Officer. The Court's opinion supports the authorities cited in Complainant's memorandum, that Respondent's bankruptcy is no defense to a PACA disciplinary action. At page 7, slip opinion, the Court states:

"Beene went into bankruptcy after failing to pay for the 227 lots of perishable produce. This does not, however, have any effect on the Secretary's power to revoke Beene's license. As the Judicial Officer explains at length, Congress specifically amended § 525 of the 1978 Bankruptcy law in order to authorize continuation of the Secretary's license revocation authority under PACA when the violations involve debts dischargeable in bankruptcy.

The matter of interstate commerce appears to be resolved by a review of the dates of the 333 transactions contained in paragraph 5 of the complaint, which Respondent does not deny. Although a majority of Respondent's purchases were made from dealers in Massachusetts, it is obvious from the dates of the transactions and the type of produce involved, that much of the produce purchased by Respondent was grown outside of Massachusetts. Consequently, at least a majority of Respondent's purchases were in interstate commerce. See: *In re C.B. Foods, Inc.*² 40 A.D. 961, *aff'd* 681 F.2d 804 (CA3), *cert. den.* 103 S. Ct 70 (1982).

The Judicial Officer's "Ruling on Certified Questions," *In re Produce Brokers, Inc.*, 41 AD 2247 (1982), which is controlling here, requires entry of a decision without a hearing when the admitted facts show that the holder of a PACA license has repeatedly failed to pay large sums to sellers of produce. Respondent's admissions in its answer provide sufficient facts to establish that Respondent has failed to make prompt payment with respect to the 333 lots of fruits and vegetables it purchased, received, and accepted in interstate commerce from 11 sellers, as alleged in the complaint. Respondent's failure to make prompt payment constitute flagrant, and repeated violations of the PACA.

The complaint, as well as complainant's motion for decisions request, that a finding be made that Respondent has committed willful³, repeated, and flagrant violations of the Act, and that the facts and circumstances of such violations be published. Such sanction is consistent with the Judicial Officer's holding in *Produce*,

¹ Copy of opinion attached.

² Copy of decision attached.

³ No finding of willfulness should be made since it is not necessary to a disposition of this case, i.e., no license is being suspended or revoked.

and the decision and order subsequently issued by the Administrative Law Judge in that proceeding. 42 A.D. 124.

In accordance with *PRODUCE* the finding relating to Respondent's violations are made on the basis of the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent, Fanfare Fruit, Inc. is a Massachusetts Corporation, whose address is 348 Turnpike Street, Canton, Massachusetts 02021.

2. Pursuant to the licensing provisions of the PACA, license number 731514 was issued to Respondent on June 7, 1973. This license terminated on June 7, 1982, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. During the period October 1981 through April 1982, Respondent violated Section 2 (4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$229,606.66, for 333 lots of perishable agricultural commodities, purchased, received and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent's failure to make full payment promptly, constitutes flagrant, and repeated violations of section 2 (4) of the Act (7 U.S.C. 499b(4)) for which the order below is issued.

ORDER

1. The hearing scheduled to begin on May 17, 1984 is cancelled.

2. A finding is made that Respondent, Fanfare Fruit, Inc., has committed flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall become effective on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

In Re: J.R. Cortes & Co. PACA Docket No. 6467 Decided March 19, 1984.

Failure to make prompt payment—engaging in business without a license—Decision.

From July 1982 through February 1984 respondent failed to make full payment promptly, and carried on a business subject to the PACA without a valid and effective license. Respondent has since made full payment, and applied for a license.

Edward M. Silverstein, for complainant.
Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary and Notice to Show Cause proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "PACA"), instituted by a Complaint and Notice to Show Cause filed on February 2, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint and Notice to Show Cause alleges that during the period July 1982 through January 1984, Respondent failed to make full payment promptly of the net proceeds and agreed purchase prices for fruits and vegetables, totaling \$41,010.10, and has carried on a business subject to the PACA, without holding a valid and effective PACA license. A copy of the Complaint and Notice to Show Cause were served upon Respondent. Respondent has filed an Answer, admitting the factual allegations of the Complaint and Notice to Show Cause. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. J. R. Cortes & Co., (hereinafter "Respondent"), is a Texas corporation, whose business address is 1500 South Zarzamora, Room 219, San Antonio, Texas 78207.

2. On January 14, 1970, license number 710964 was issued to Respondent. This license was renewed annually, but terminated on January 14, 1983, pursuant to Section 4 (a) of the PACA (7 U.S.C. 499d (a)), when Respondent failed to pay the required annual li

cense fee. On January 3, 1984, Respondent filed a new application for a PACA license.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraphs 7 through 10 of the Complaint, during the period July 1982 through February 1984, Respondent failed to make full payment promptly of the net proceeds and agreed purchase prices, totaling \$41,010.10 for fruits and vegetables shipped in interstate commerce, and carried on a business subject to the PACA without a valid and effective PACA license.

5. Since the institution of this proceeding, Respondent has made full payment to the shippers and sellers of the amounts due in respect of the transactions set forth in Findings of Fact No. 4.

Respondent has committed willful, flagrant and repeated violations of Sections 2 and 3 of the PACA (7 U.S.C. 499b), by engaging in a business without a valid and effective PACA license and by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent shall be issued a license pursuant to a PACA on the ninetieth day after the date of issuance of this order. Said license shall be suspended for ninety (90) days from its issuance.

This order shall become effective upon issuance.

Copies hereof shall be served upon the parties.

In Re: R. H. PRODUCE INC. PACA Docket No. 2-6069. Decided April 6, 1984.

Failure to make payment—Decision

Dennis Bicker, for complainant.

Jay Martinez, Phoenix, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*) in which Administrative Law Judge William J. Weber filed an initial decision and order on January 27, 1984, suspending respondent's license for 80 days for failing to pay promptly six sellers over

\$222,000 for 72 lots of produce purchased and accepted in interstate commerce during the period February through July 1981.¹

On February 29, 1984, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).²

The case was referred to the Judicial Officer for decision on March 21, 1984.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145 (d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

For the reasons set forth below, respondent's license should be suspended for 55 days.

FINDINGS OF FACT

1. Respondent, R. H. Produce, Inc., P.O. Box 1851, Nogales, Arizona 85621, is an Arizona corporation which was issued PACA license 79089 on February 14, 1979. This license was renewed annually and is next subject to renewal on February 14, 1985.

2. During the period February 1981 through July 1981, respondent purchased, received, and accepted 72 lots of perishable agricultural commodities from six sellers in interstate and foreign commerce, and was generally 5 to 22 months late in making payment in full of the agreed purchase prices, which totaled over \$222,000.

3. Respondent has now paid in full for the perishable agricultural commodities referred to in Finding 2.

4. Respondent's failures to make full payment promptly constitute wilful, flagrant and repeated violations of § 2 (4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1983 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

² The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

CONCLUSIONS

I.

Section 2 of the Perishable Agricultural Commodities Act provides (7 U.S.C. § 499b):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

* * * * *

The regulations specify the period in which payment must be made in order to comply with that statutory requirement (7 CFR § 46.2 (aa)). In most instances, payment must be made within 10 days, but the regulations permit the parties by express agreement at the time the contract is made to provide for a different payment time. Specifically, the regulations provide (7 CFR § 46.2 (aa)):

(aa) "Full payment promptly" is the term used in the act in specifying the period of time for making payment without committing a violation of the act. "Full payment promptly," for the purpose of determining violations of the act, means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

* * * * *

(9) . . . *Provided, however,* That as an exception to paragraphs (aa) (1) through (9) of this section, the parties may,

by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute "full payment promptly": *Provided further*, 'That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.'³

An agreement to provide a different time for payment does not have to be in writing.⁴ However, the agreement must be reached at the time the contract is made, or it is meaningless for determining violations of the prompt payment requirement. For example, an agreement to extend the time for payment made after the payment time has expired does not negate the violation.⁵

There is a sound basis for the regulatory requirement that agreements to extend the time for payment must be made at the time the purchase contract is made. After the buyer has the produce, the parties are no longer dealing on equal terms. The seller can no longer refuse to sell; the buyer is the only one with options, i.e., he can pay or not pay, as agreed. Thus the buyer would have an unfair advantage in any negotiations on payment terms after delivery. In order to ensure that the parties deal on equal terms, the regulations do not recognize (for disciplinary purposes) changes made in the time for payment after the contract is made.

Respondent contends that in the Nogales, Arizona, area, it is the custom and usage to pay later than 10 days (Appeal Brief, at 14-16). Respondent contends that this custom and usage has the force of law, citing *Pasco County Peach Ass'n v. T.F. Solley & Co.*, 146 F.2d 880, 882 (1945), which held:

Only a custom of such general character as to have the force of law will sustain Solley's position . . . Should Pasco have no knowledge (actual or constructive) of the practice relied on, it cannot be said to be absolutely bound by any such custom existing in Baltimore.

³ The regulations were amended to require an express agreement, 37 Fed. Reg. 14561 (1972), following the decision in *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557-61 (1971), holding that an implied agreement was sufficient under the then existing regulations.

⁴ *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557 (1971). Although the regulations were amended following this decision, the amended regulations do not require a written agreement to delay payment, 7 CFR § 46.2(aa)(9).

⁵ *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1382 (1979), *aff'd per curiam*, 630 F.2d 370, 373 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

However, that case is distinguishable because no regulation was involved. In the present case, the express terms of the regulation, which has the force and effect of law, are binding.

Respondent further relies (Appeal Brief, at 15-16) on *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1378 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981), in which it is stated in a *finding of fact* by an Administrative Law Judge, adopted by the Judicial Officer:

Moreover, we further find that there was no express agreement or custom of doing business between the parties in effect at the time of shipments which *substantially* altered the requirement of the regulation.

That finding of fact is not the equivalent of a holding that a custom of doing business between the parties would negate the requirement of the regulations for an "express agreement at the time the contract is made" (7 CFR § 46.2(aa)(9)). Where the issue was squarely presented in a subsequent case, the Judicial Officer held that a regular course of dealing between parties over several years, in which payment is made beyond 10 days, does not show the existence of an express agreement, as required by the regulations, since such a course of dealing is just as indicative of an implied agreement as an express agreement. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 958-61 (1982). In *Hampshire*, the Judicial Officer stated (41 Agric. Dec. at 958):

Judge Baker states that a "regular course of dealing between the parties over several years may be considered as supportive or corroborative evidence that express agreements were in existence during the course of dealings" (Initial Decision 31). That view is erroneous since a course of dealing is just as indicative of an implied agreement as an express agreement. The distinction between an express agreement and an implied agreement is decisive since the regulations were expressly amended to require express agreements following the decision in *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1542, 1557-59 (1971), which held that the regulations then in effect exempted a buyer from the 10-day rule if there was an implied agreement in existence for deferred payment.

If, however, the parties involved in buying and selling perishable agricultural commodities expressly agree that in a series of subsequent transactions, the time for payment shall be extended beyond 10 days, they do not have to expressly discuss delayed payment at the time of entering into each of the subsequent transactions. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 961-62 (1982).

In the present case, after respondent was late in making payments in some of the transactions referred to in Finding 2, respondent gave promissory notes to the creditors, calling for payments to be made over an extended period. But these subsequent arrangements, made after the parties had agreed upon the purchase contracts, are meaningless in this disciplinary proceeding under the express terms of the regulations.

In addition, a promissory note is, of course, merely a promise to pay it is not "full payment," as required by the Act. Even if a creditor were to accept a promissory note as "payment," that would not negate a violation of the Act. This is analogous to the well settled principle that where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act.⁶ However, in the present case, respondent has now made full payment for all the perishable agricultural commodities referred to in Finding 2, so there is no issue in the case in this respect.

As to the transactions involving one of the sellers, respondent originally tendered the amount of payment respondent believed due on the transactions, which was in dispute, as an accord and satisfaction. The debtor originally did not agree to accept the amount tendered as full payment. Respondent's original tender would not have constituted full payment since it was conditioned on the debtor accepting the tender as full payment of the disputed amount. But the money has not been paid, and that issue is no longer in the case.

Respondent contends that since the term "payment" is not defined in the Act or regulations, the Act and regulations are unconstitutional void for vagueness (Appeal Brief, at 8-14). That argument is frivolous. As far as I know, respondent is the first person regulated by the Perishable Agricultural Commodities Act who claimed to have any doubt as to the meaning of the term "pay-

⁶ *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774, 782 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1982); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 88 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Kafcsak*, 39 Agric. Dec. 683 (1982), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1611, 1633, 1639-40 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir. *cert. denied*, 434 U.S. 920 (1977)); *In re Marvin Tragash Co.*, 33 Agric. Dec. 888, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

ment," as used in the Act and regulations. Assuming (without conceding) that in some hypothetical situation there might be a basis for a reasonable question as to whether the admitted facts constituted "payment," the facts here present no basis for any constitutional issue in this respect.

II.

Respondent's failures to pay promptly such large sums of money (over \$222,000) for so many lots of produce (72) are repeated and flagrant violations of the act.⁷ The lengthy delays in payment (up to 22 months) are an additional, flagrant circumstance. The fact that respondent continued to purchase produce for several months during which it was failing to pay promptly for produce previously purchased is another flagrant circumstance. *Cf. Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), in which the court said with respect to a failure to pay case under the Perishable Agricultural Commodities Act:

As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act.

It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners conduct.⁸

⁷*In re Foursome Brokerage, Inc.*, 42 Agric. Dec. _____ (Dec. 5, 1983), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1381, 1387 (1979), *aff'd per curiam*, 630 F.2d 370, 374 (5th Cir. 1980); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1116 (1978).

⁸*Accord Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982); *George Steinberg & Son, Inc v. Butz*, 491 F.2d 988, 994 (2d Cir. 1973), *cert. denied*, 419 U.S. 830 (1974); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. _____ (Dec. 5, 1983), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2427-28 (1982), *appeal docketed*, No. 82-3826 (5th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1170, 1179 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743-44 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1135 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978); *In re Atlantic Produce co.*, 35 Agric. Dec. 1631, 1640-41 (1976); *aff'd per curiam*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977) (all involving continuing business activities during a period when respondents knew they were in serious financial difficulty).

In addition to being repeated and flagrant, respondent's violations were also wilful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)). *In re Shatkin*, 34 Agric. Dec. 295, 297-314 (1975). "Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981).

Since respondent's conduct was "wilful," as that term is used in the Administrative Procedure Act, no warning letter was necessary. Complainant frequently issues disciplinary complaints without warning letters where violations are wilful, flagrant and repeated.

The serious nature of violations involving failure to pay promptly for perishable agricultural commodities is explained in *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 132-33, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975), as follows:

Failure to pay promptly for perishable agricultural commodities is a serious violation of the Act. As explained by Paul D. Koenigsberg, a witness for complainant (Tr. 50-51):

A The law may be referred to as a fair trading act in the produce industry. The law was requested by the industry for its own protection.

Its intent is to suppress unfair or fraudulent practices. And the Act spells out the practices that are to be suppressed or prohibited or are considered violations.

The basic reason is that the produce industry is a fast moving business. It is done on trust and payment must be obtained so that the shipper, let's say, or seller can pay his help, can pay his supplier, who may be a farmer or another packer. The law spells out the terms for such payments. It spells out what may be done to extend time of payment.

Primarily, each dealer is supposed to operate on his own funds and not operate on the funds of his supplier. In being a slow pay or a late pay, the receiver in effect is using the supplier's funds, the supplier's money without having to borrow on his own, without paying interest and in many, many cases forces the supplier to go to other financial sources to obtain funds to be able to pay for his own operations. Usually in obtaining these funds that supplier has to get a bank loan and pay interest.

Q Carrying on that thought, Mr. Koenigsberg, it is your experience in the years you've served with the Perishable Agricultural commodities Act program that persons who pay late are a severe risk within the industry?

A Yes, it is quite often we have seen persons running up quite a history of late pay and then closing the doors, going out of business. It left the suppliers with very faint hope of recovery of the funds. And in very, very many instances the funds that were recovered were very small percentage of the amounts due.

Similarly, in *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 168-69, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975), it is stated:

Failure to pay promptly for perishable agricultural commodities is a serious violation of the Act. As explained by Paul D. Koenigsberg, who has been involved with this regulatory program for about 32 years and is in charge of its disciplinary unit (Tr. 18, 26-27):

Q Okay. Now, in bringing one of these disciplinary proceedings for no payment or slow payment, does the department consider itself as carrying out the desires of the industry or simply is it the department desires to be the regulatory agency?

A No, sir, the department considers itself a service agency rather than a police agency. It is the industry's desire and has been expressed by the industry nationally any number of times, as a matter of fact, the national potato counsel just recently at its, I assume, annual meeting, made a question of slow pay, no pay, the first order of discussion and business and quite a large article appeared in the "Packer" of November 17, 1973. I believe that is the correct date. The "Packer" is a trade newspaper.

Q Now, going back to the departments in general, why is it that failures to pay promptly are considered serious violations?

A By a buyer failing to pay the seller promptly quite often the seller is forced to borrow money on the open financial market and pay interest on it. At times if a seller is operating in very close operations he may not be able to get money from a bank or a finance company and we have had any number of occasions where the sellers have been forced out of business, but [at] the same time with the seller not having enough money to pay his bills, his creditors may be hurt because they can't get paid. The seller can't pay his employees, the creditors can't pay their bills and their employees. It winds up in a vicious cycle, and as I say, quite often some people are forced out of business by that.

In the *Acevedo* and *Southwest Produce* cases just cited, and in *In re Alex's Produce*, 41 Agric. Dec. 287, 288-89 (1982), 70-day suspension orders were issued for prompt payment violations much less serious than those involved here.

In *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984), an 80-day suspension order was issued for prompt payment violations comparable to those involved here. In *In re L.R. Morris Produce Exchange, Inc.*, 37 Agric. Dec. 1112, 1114-22 (1978), a 90-day suspension order was issued for prompt payment violations more serious than those involved here. In *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1375-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981), an order was issued suspending respondent's license for 14 days and an additional 30 days, to run consecutively, for prompt payment violations involving much smaller sums of money than are involved here. In one respect, however, the case was particularly flagrant because respondent was previously found to have violated the prompt payment requirements of the Act. The suspension order in that case was actually more severe than its length would indicate because the respondent was an exceptionally large operator, which hired from 25 to 30 employees (38 Agric. Dec. at 1385). In suspending respondent for 30 days in addition to 14 days as a result of the prior order, the Judicial Officer stated (38 Agric. Dec. at 1387):

It would seem that a much longer suspension period than the 30 additional days recommended by complainant on appeal might be appropriate. But in view of the tremendous size of respondent's business, and the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials, respondent's registration will be suspended for 30 days for its present violations, and for 14 additional days under the 1971 order.

Since the Judicial Officer has now overruled his self-imposed limitation never to increase the sanction recommended by the administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1980), *aff'd*, 713 F.2d 179 (6th Cir. 1983)), a longer suspension order than the 44 days imposed in *American Fruit* would be imposed in any future, similar case.

In *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1512, 1597-98 (1971), a 14-day suspended suspension order was issued in a prompt payment violation case because the record indicated that respondent thought it had implied agreements which justified delays in payment, respondent notified complainant of its views on a number of occasions, and there was no evidence in the record that complainant ever corrected respondent's misunderstanding. The regulations were subsequently amended to remove any basis for a misunderstanding in this respect and, therefore, the 1971 *American Fruit* case is not a precedent for imposing light sanctions

in prompt payment cases. *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385-87 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 717 n. 7 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 35 n. 7 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 176-77, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 137-38, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),⁹ set forth in the Appendix to this decision.¹⁰ The Department's sanction policy is also discussed at length in *In re Esposito*, 33 Agric. Dec. 613, 624-65 (1979).

⁹ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions, e.g., *In re Economou*, 32 Agric. Dec. 14, 116-20 (1973), *rev'd on other grounds*, 494 F.2d 519 (2d Cir. 1974), before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

¹⁰ Severe sanctions issued pursuant to this policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nam. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Cotonzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515,

In *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (slip op. at 20) (Dec. 5, 1983), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984), it is explained that there are "many steps that can be taken to minimize the likelihood of payment violations," and, therefore, "severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry."

In view of the serious and flagrant nature of respondent's repeated violations, a revocation order would be authorized by the Act, 7 U.S.C. § 499h(a). However, in view of the precedents discussed above, a 55-day suspension order is appropriate.¹¹

Respondent contends that the suspension order imposed by Judge Weber is inequitable and unlawful because Judge Weber disregarded a number of mitigating circumstances. Respondent argues that it was adversely affected by the fact that (i) it loaned about \$156,000 to three Mexican growers (the Espinoza family), and about \$109,000 of that amount was not repaid; (ii) it lost about \$184,000 when a produce dealer failed to pay for produce; (iii) Nogales, Arizona, was an economically depressed area in 1980 and 1981, partially as a result of several devaluations of the Mexican peso; and (iv) respondent employs 45 to 50 minority employees who would be affected by a suspension order.

These circumstances would not be sufficient to reduce the 55-day suspension order issued here even if they were to be considered. Respondent voluntarily chose to loan large amounts of money to a family in Mexico, which was not (and could not constitutionally be made) subject to a reparation action under the Act. The loss from the loan is analogous to the loss from the extension of a large amount of credit to a purchaser, as to which it is stated in *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 719-20 (1978):

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the con-

539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

¹¹ An 80-day suspension order would have been issued except for the fact that respondent is an exceptionally large operator. See *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *appeal docketed*, No. 83-2548 (8th Cir. Nov. 18, 1983); *In re Mage Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1571 (1981), *aff'd per curiam*, 742 F.2d 840 (9th Cir. 1983); *In re Esposito*, 38 Agric. Dec. 613, 631-32 (1979); *In re Townsend*, 35 Agric. Dec. 1604, 1607 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1845-51 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1579-82 (1974).

sequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

Similarly, a licensee should be adequately capitalized to meet its obligations promptly in economically depressed times as well as in good financial times. Where, as here (at least with respect to many of the violations), a respondent knows of conditions that might make prompt payment difficult or impossible, it may obtain additional time for making payment if it can obtain express agreements for deferred payment at the time of making the contracts. Otherwise, it must be adequately capitalized to pay promptly.

In disciplinary cases under the Perishable Agricultural Commodities Act, all excuses that have been offered as to why payment was not made promptly have been routinely ignored since "the Act calls for payment not excuses."¹²

Similarly, in "no pay" cases, i.e., where full payment has not been made for all produce transactions involved in the case, all excuses have been routinely rejected since "the Act calls for payment not excuses."¹³

¹² *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983) (delayed payment because one member of firm, who left the firm as a result of the violations, incurred large obligations without notifying his partners), *appeal docketed*, No. 84-4079 (5th Cir. Feb. 3, 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139-40 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 31 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

¹³ *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983) (non-payment because of bankruptcy resulting from the failure of a large purchaser from respondent to comply with its agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ____ (Aug. 31, 1983) (non-payment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. ____ (Mar. 25, 1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), *appeal docketed*, No. 82-3826 (5th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment

Continued

In affirming the Judicial officer's decision in a "no pay" case under the Perishable Agricultural Commodities Act, in which the Judicial Officer ignored all mitigating circumstances, the court held in *Finer Foods Sales Co v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983):

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment not excuses.'" Quoting *In re*

because of bankruptcy of another firm owing respondent \$776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 688 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 41 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafezak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd*, 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Son Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 824 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 70 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-12 (1976) (non-payment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re Salt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over \$130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1919) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1914) (non-payment because of financial difficulties).

Kafcsak, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (citing H.Rep. No. 1196, 84th cong., 1st Sess.), Reprinted in 1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.

Quoting *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 720 (1978).

In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwrick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) quoted in *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

It is possible that extraordinary mitigating circumstances might be sufficient to reduce the sanction in a payment violation case under the Perishable Agricultural Commodities Act. As stated in *In re Produce Brokers, Inc.*, 41 Agric. Dec. 2247, 2250-51 (ruling on certified questions), *final decision*, 42 Agric. Dec. 124 (1982):

Although mitigating circumstances are generally considered in determining sanctions in the Department's disciplinary cases, all excuses as to why payment was not made have been disregarded in determining the sanction in cases involving failure to pay under the Perishable Agricultural Commodities Act in view of the statutory provi-

sions and the nature and history of the program. *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979).

Judge Weber's final question—"What might constitute mitigation to reduce the sanction?"—involves a hypothetical question that need not be determined here. It is sufficient for present purposes to rely on settled precedent holding that the customary excuses for payment violations are ignored in determining sanctions under the Perishable Agricultural Commodities Act. Such excuses include violations caused by financial difficulties resulting from a variety of reasons, such as the failure of a large creditor to pay respondent, business recessions, strikes, adverse weather conditions, sudden loss of a major account, ill health of a key person, etc.

It will be time enough to determine what extraordinary circumstance, such as war, 1932 type depression, collapse of the national banking system, etc., might constitute mitigation to reduce or eliminate a sanction under the Perishable Agricultural Commodities Act if such a circumstance is presented on the record of a case.

The fact that respondent's employees will suffer from a suspension order is a very unfortunate circumstance, but any hardship to a respondent's community, customers or employees which might result from a suspension order is always disregarded in determining sanctions since the national interest of having fair and competitive conditions in the regulated agricultural industries must prevail over the local interests which might be temporarily damaged as a result of a suspension order.¹⁴

¹⁴ *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ____ (Aug. 31, 1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (1983) (order denying intervention) (creditor who would be damaged by disciplinary order against respondent not permitted to intervene in respondent's appeal proceeding), *final decision*, 42 Agric. Dec. ____ (Mar. 25, 1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, No. 82-3826, slip op. at 7 (6th Cir. Feb. 28, 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 35 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 958 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

whether the sanctions imposed in prior proceedings have served as a deterrent to similar violations by others.¹³

Evidence as to the sanction may include an opinion as to an ultimate issue in the case, e.g., what suspension period should be imposed if the allegations of the complaint are proven.¹⁴ Such an opinion is, of course, only a recommendation by the administrative agency which, although entitled to appropriate weight, is not controlling even in the absence of countervailing opinions.

Sanction evidence "is as important in determining appropriate administrative sanctions as Probation Officer reports and sentencing proceedings are in criminal proceedings."¹⁵ Since the Department of Agriculture does not have post-hearing sentencing proceedings, if any evidentiary assistance as to the appropriate sanction is to be given to the Administrative Law Judges and the Judicial Officer, it must be given at the hearing in the case.

Although sanction evidence has been very helpful in determining the policy to be applied in the Department's administrative disciplinary cases, since I have reviewed the records of about 40 payment violation cases under the Perishable Agricultural Commodities Act and the policy in this area is well settled, it will no longer be necessary for the parties to introduce sanction evidence in such payment violation cases, unless it relates to the particular respondent, e.g., the size and nature of his business.

Nonetheless, the parties may, if they believe it will be helpful, continue to introduce any type of sanction evi-

¹³ *In re Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, No. 82-3015 (6th Cir. July 13, 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1919 (1981) (order denying reopening), *aff'd*, No. CV 81-6435 (C.D. Cal. Oct. 20, 1982), *appeal docketed*, No. 82-6029 (9th Cir. Nov. 12, 1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978); *In re Loretz*, 36 Agric. Dec. 1087, 1096 (1977); *In re Christ*, 35 Agric. Dec. 195, 203 n.8 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Miller*, 33 Agric. Dec. 53, 80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974); *In re Professional Commodity Serv., Inc.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

¹⁴ *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 140-44, *aff'd per curiam*, 521 F.2d 977 (5th Cir. 1975); *In re Professional Commodity Serv., Inc.*, 32 Agric. Dec. 585, 590-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850 (1972) (order denying reconsideration).

¹⁵ *In re Esposito*, 38 Agric. Dec. 613, 656 (1979).

dence in payment violation cases. As to all other types of cases, the policy of encouraging the parties to introduce sanction evidence remains in effect.

In the present case, although complainant's sanction evidence was helpful, the same result would have been reached in the absence of such evidence, based on the well settled policy established in prior cases.

IV.

Respondent contends that there is no evidence that Charles Hoeffer is a person who was responsibly connected with respondent (Appeal Brief, at 27). However, that issue may be raised only in a separate proceeding under 7 CFR §§ 47.47-68, and not in a disciplinary proceeding.¹⁵

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is suspended for 55 days.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

This order shall be effective on the 20th day after service thereof on the respondent.

In Re: CLARENCE MILLER CO. INC. PACA Docket No. 2-6394. Decided April 18, 1984.

Failed to make full payment promptly—Decision.

Respondent purchased and accepted shipments of produce on numerous occasions and failed to pay promptly. After an initial Decision and Order in December 1985 respondent appealed to the Judicial Officer to decide the Department case. It was found that Respondents failure to make full payment on 33 transactions and then 68 transactions constitute flagrant, repeated and willful violation for the act. Respondents license is revoked.

Dennis Becker, for complainant.
Respondent, *pro se*.

¹⁵ *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782-83 (D.C. Cir. 1983); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1889-90, 1900-03 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 245-48, 260 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Kafesak*, 39 Agric. Dec. 683, 687 (1980), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge William J. Weber filed an initial Decision and Order on December 6, 1983, revoking respondent's license for failure to pay sellers promptly \$107,766.15 for 68 lots of produce purchased and accepted in interstate commerce from August 1982 through April 1983, and failure to make full payment totalling \$48,589.28 for 33 lots of produce purchased and accepted from October 1982 through March 1983.¹

On December 14, 1983, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² On April 16, 1984, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, the initial decision and order is adopted as the final decision and order in this case, except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow Judge Weber's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 13, 1983, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 1 (1981 and Aug. 1983 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

² The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 761 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

period August 1982, through April 1983, respondent purchased and accepted, in interstate and foreign commerce, from 16 sellers, 101 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$156,355.43.

A copy of the complaint was served upon respondent on September 15, 1983, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Clarence Miller Co., Inc., is a corporation whose address is 2014 Smallman Street, Pittsburgh, Pennsylvania.

2. Pursuant to the licensing provisions of the Act, license number 800852 was issued to respondent on April 16, 1981, was renewed annually, presently is in effect, and is next subject to renewal on or before April 16, 1984.

3. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period October 1982 through March 1983 respondent purchased and accepted in interstate and foreign commerce from four sellers, 33 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment of the agreed purchase prices, or balances thereof, in the total amount of \$48,589.28, as reflected by transaction numbers 15-30, 42-48 and 92-101.

4. As more fully set forth in paragraphs 5 and 6 of the complaint, during the period August 1982 through April 1983 respondent purchased and accepted in interstate and foreign commerce from 11 sellers 68 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$107,766.15, as reflected by transaction numbers 1-14, 31-41 and 49-91.

CONCLUSIONS

Respondent's failure to make full payment with respect to the 33 transactions set forth in Finding of Fact No. 3, above, or to make full payment promptly with respect to the 68 transactions set forth in Finding of Fact No. 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's "appeal" consists in its entirety of the following letter to the Hearing Clerk:

In answer to your letter of December 6, 1983, regarding above PACA Docket. If you will check your records, or the people involved with this action, you will find that these commitments have been satisfied by the Clarence Miller Co., Inc.

Accordingly, the only issue on appeal is whether a suspension order should be issued in this case, rather than a revocation order, under the policy announced in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ____ (Jan. 27, 1984). In *Gilardi*, after setting forth the Department's settled policy to revoke the license of a respondent who fails to pay for produce in violation of the Perishable Agricultural Commodities Act, and to issue a lengthy suspension order if a respondent fails to pay promptly for produce in violation of the Act (slip op. at 6-33), the new policy is set forth that full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), in order to be considered in determining the sanction. It is stated, however, in *Gilardi*, that as to pending cases, such as the present *Clarence Miller Co.* case, the respondents will be afforded additional time within which to make full payment. Specifically, it is stated in *Gilardi* (slip op. at 42-49):

Respondent argues that after the hearing in this case, it reduced its debt to about \$30,000, which should be paid within the next 30 days (Appeal Brief, at 10). It is established that if a case begins as a "no pay" case, but full payment is made by the time of the hearing, the case becomes a "slow pay" case, which warrants a suspension order rather than a revocation order. *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983).

As far as I know, there has been only one case under the Perishable Agricultural Commodities Act treated as a "slow pay" case in which full payment was made after the hearing. *In re L.R. Morris Produce Exchange, Inc.*, 37 Agric. Dec. 1112, 1119-22 (1978). In that case, full payment was made before the initial decision was issued by the Administrative Law Judge. A 90-day suspension order, rather than a revocation order, was imposed, with the following caveat (37 Agric. Dec. at 1121-22):

In view of respondent's flagrant violations extending over a period of several years, and involving delays of up to 23 months in payments for over \$1 million worth of produce, if respondent

knowingly violates the payment provisions of the Act or regulations on one more occasion within the next five years as to a contract entered into on or after the effective date of this Order (which does not involve a bona fide dispute as to the contract), respondent's license will be revoked. If further violations occur which are not knowingly committed, a lengthy suspension order will be imposed.

In a pending case under the Perishable Agricultural Commodities Act, *In re Clarence Miller Co.*, PACA Docket No. 2-6394, it is alleged on appeal that full payment was made after the initial decision was issued by the Administrative Law Judge. Since the same issue may arise in the present case, perhaps within a few days after this decision is filed, it is appropriate to set forth the policy that will govern in such situations.

There are substantial reasons for making the final determination as to whether a case is "slow pay" or "no pay" as of the date on which the administrative hearing begins. Any determination made after that time would require a new investigation by complainant which might unduly delay the proceeding. Each day that the payment violations continue results in increased risk and damage to the industry. The increased damage to existing creditors is obvious—they are forced to wait longer for their money. The increased risk to others arises from the fact that a firm in financial difficulty frequently increases its volume significantly, perhaps taking imprudent chances, thereby exposing many other unsuspecting persons to the risk of non-payment, if the debtor's efforts to regain financial stability are unsuccessful. Since there is a considerable time lag between the violations and the hearing, there is no real justification for not making full payment by the opening of the hearing.

Accordingly, the policy in future cases will be that if full payment is not made by the opening of the hearing, together with present compliance with the payment provisions of the Act and regulations (or if no hearing is to be held, by the time the answer is due), the case will be treated as a "no pay" case. There is, of course, no basis for considering as mitigating payments that are made by "robbing Peter to pay Paul," i.e., by "rolling over" the past-due accounts involved in the case, while continuing to violate the payment requirements.²⁶ (I cannot now conceive of extraordinary circumstances that would warrant further extending the time for making full payment and achieving

²⁶ To the extent that there is a bona fide dispute as to the amount due in a particular transaction, it should be excluded from consideration.

compliance, but if any exist, they can be considered in a concrete factual setting.)

However, in view of *Morris*, discussed above, this new policy should not be applied to the present case, or other cases in which the time for converting a "no pay" case to a "slow pay" case would have elapsed before the licensee had an opportunity to learn of the new policy (by publication of this decision in Agriculture Decisions or personal notice of this decision). An interim policy should be followed in such cases.

Under the interim policy, a case may be converted from a "no pay" case to a "slow pay" case by full payment of the debts involved in the case (together with present compliance) not later than (i) the 30th day after (a) publication of this decision in Agriculture Decisions or (b) personal notice of this decision by the respondent or respondent's attorney, or (ii) the time for filing a petition to reconsider the Judicial Officer's decision, whichever occurs first.

The present respondent may assert full payment (and present compliance) in a petition for reconsideration filed with the 10 days permitted in the Rules of Practice (7 CFR § 1.146(a)(3)). This would give respondent sufficient time in which to make full payment since respondent's appeal brief dated December 23, 1983 (filed December 29, 1983), states that full payment should be completed "within the next thirty (30) days" (Appeal Brief, at 10). Moreover, respondent's attorney, Mr. David Hall, was advised by the Judicial Officer in a telephone conversation on January 9, 1984, that if respondent wanted to have full payment considered in determining the sanction in this case, time was "of the essence" since (i) oral argument would probably be denied, (ii) complainant's brief is normally filed within several weeks after an appeal, and (iii) the Judicial Officer is usually fairly prompt in deciding cases.

Where, as here, the hearing has already been held in a case, it is important that this interim policy (which affords a respondent a much longer time period in which to make full payment than the permanent policy to be followed in future cases) not delay the proceeding more than necessary. The proceeding would be delayed too long (resulting in too much increased risk and damage to the industry) if there were a need to reopen the hearing. (In the present case, a reopened hearing would also require a new decision by the Administrative Law Judge, with the opportunity for a further appeal to the Judicial Officer.) Accordingly, under the interim policy, unless complainant files a statement verifying a respondent's full payment and present compliance, payments made after the opening of the hearing will not be considered.

Under this interim policy, complainant will be permitted to determine the facts as to respondent's late payment and present compliance. However, it is presumed that the administrative officials will properly discharge their administrative duties, in this respect. And a respondent is in no position to complain where its proven violations warrant revocation of its license even if full payment is finally made after the opening of the hearing.

For example, in the present case, even if respondent were to make full payment within a few days after the filing of this decision, respondent's violations would, nonetheless, be so flagrant and repeated as to warrant revocation of its license, in view of the large sums of money involved in the violations and the lengthy delays in making full payment. See *Reese Sales Co. v. Hardin*, 458 F.2d 183, 184-87 (9th Cir. 1972) (Judicial Officer properly denied petition for rehearing and reconsideration where respondent's license was revoked for failure to pay \$19,059.08 to nine sellers in 26 transactions, and full payment was not made until a few days after the final decision).

The imposition of a suspension order, rather than a revocation order, in flagrant and repeated "slow pay" cases is not mandated by the Act but, rather, is a self-imposed limitation, which is admittedly experimental. *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-73 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133-34 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). Where a respondent has committed repeated and flagrant violations of the magnitude involved here, this self-imposed limitation would not be followed if a determination as to whether full payment was finally made (long after the hearing) would require the lengthy delay incident to a reopened hearing, a new Administrative Law Judge's decision, and a further appeal to the Judicial Officer.

In the present case, if respondent makes full payment within the period set forth above, and complainant certifies such payment and present compliance, the revocation order will be changed to an 80-day suspension order. See *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983). However, if a new hearing were required to determine full payment and present compliance, the Judicial Officer would follow *Reese* and deny a petition for rehearing or reconsideration, in order to avoid further risk and damage to the industry.²⁷

²⁷ The *Reese* case afforded the present respondent an opportunity to learn that under existing policy, full payment made after the final decision would not be considered.

Following the *Reese* case and refusing to consider respondent's payments made after the filing of this decision would not be imposing a more severe sanction on respondent than on others. But even if a more severe sanction policy were to be adopted in a particular case, without prior warning to the regulated industry, that would be in accordance with the Department's sanction policy, which provides (*In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974) (Appendix, at 24a-26a):

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller v. Securities and Exchange Commission*, 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n v. WOKO*, 329 U.S. 223, 228; *Continental Broadcasting v. Federal Comm. Comm'n.*, 439 F.2d 580, 582-584 (C.A. D.C.); *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.

In *Communications Comm'n v. WOKO*, 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in

determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Similarly, in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

As I stated in *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972):

In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

Following respondent's "appeal," complainant's attorney sent a letter, certified mail-return receipt requested, to respondent's president on February 24, 1984, which states in its entirety:

This letter is written to advise you of the holding by the Judicial Officer in *In re: Gilardi Truck & Transportation, Inc.*, in his Decision and Order dated January 27, 1984. A copy of that Decision and Order is attached. I particularly refer you to pages 42 through 49 of the opinion.

If within 30 days from your receipt of this letter Clarence Miller Co., Inc. has not paid *all* produce debts alleged in the case against it, and is not also current with respect

to all other produce debts, complainant will immediately seek on this appeal to have the license of Clarence Miller Co., Inc., revoked. In any event, complainant will demand a suspension of the license even if such debts are paid. The only evidence which complainant will consider sufficient to cause it to ascertain the accuracy of any allegation of complete compliance will be a sworn affidavit to that effect, which affidavit must be sufficient to subject the maker to judicial action if it is untrue.

The letter was received on February 28, 1984, but no response has been made to the letter. Accordingly, a revocation order is warranted for respondent's wilful, repeated and flagrant violations of the Act.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

In Re: R. H. PRODUCE INC. PACA Docket No. 2-6069. Decided April 23, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

On April 23, 1984, respondent filed a petition for reconsideration of the decision and order filed in this proceeding on April 6, 1984. The petition merely reargues matters fully considered by the Judicial Officer when the decision and order was filed, and it is denied for the reasons set forth in the decision filed herein.

Respondent argues that it entered into payment agreements with sellers "shortly after produce was received and negotiations concluded between the parties" (Petition for Reconsideration, at 4). But as explained in the decision filed in this proceeding, such agreements did not extend the 10-day period for making full payment since the payment agreements were not made at the time the original sales contracts were made. Hence respondent violated the Act and regulations unless it made "full payment" within 10 days after the day on which the produce was accepted. 7 CFR § 46.2(a)(1). That was not done.

Respondent contends that it "paid its creditors in a number of ways, including promissory notes, payments to the shipper's growers, direct payments and cancellation of [debts] owing to the Respondent, among other methods" (Petition for Reconsideration, at 6). Respondent could lawfully have used a variety of methods to make "full payment. However, irrespective of the method respondent used to make "full payment," such "full payment" must have been fully consummated within 10 days after the day on which the produce was accepted, to constitute "full payment promptly."

For example, if respondent gave a promissory note, it would have to pay the promissory note in full within 10 days. If respondent paid the shipper's growers, it would have to make such payment within 10 days. Admittedly, respondent did not completely perform what needed to be performed to fulfill its obligations to the sellers within 10 days after the day on which the produce was accepted. Hence respondent violated its duty under the Act and regulations to make "full payment promptly," i.e., within 10 days after the day on which the produce was accepted.

Since respondent's petition merely reargues matters previously presented to the Judicial Officer, the order should become effective on the same day previously specified.

ORDER

Respondent's petition for reconsideration is denied.

No change shall be made in the effective date of the order previously specified.

Copies hereof shall be served upon the parties.

REPARATION DECISIONS

MARRA & ASSOCIATES and STEVE M. VOLPE d/b/a VOLPE AND MARRO ASSOCIATES a/t/a ROYAL MADESA VINEYARDS v. CROWLEY SALES AND EXPORT Co., PACA Docket No. 2-6318. Decided March 2, 1984.

It is agreed by both the parties that a transaction took place. Respondents denies that it owes the contract price because of the poor condition of the grapes upon arrival. Upon inspection it was found that complainant had breached the suitable shipping condition warranty. Therefore, respondent is liable for contract price, less damages.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,600 in connection with the sale of a truckload of grapes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given the opportunity to submit additional evidence in the form of verified statements as well as briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Marra & Associates and Steve M. Volpe d/b/a Volpe & Marra Associates a/t/a Royal Madera Vineyards, is a partnership whose address is 7770 Road 33, Madera, California.
2. Respondent, Crowley Sales & Export Co., is a corporation whose address is Box 827, Watsonville, California. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On approximately October 11, 1982, complainant sold to respondent a truckload of grapes consisting of 48 lugs of Alicante at \$7.20 per lug, or \$345.60, 336 lugs of Muscat at \$7.20 per lug, or \$2,419.20, and 336 lugs of Zinfandel at \$7.65 per lug, or \$2,570.40,

plus \$.70 per lug precooling and palletizing, or \$504, totalling \$5,839.20 f.o.b.

4. On approximately October 12, 1982, complainant shipped the load of grapes in interstate commerce to respondent's customer in either Beaver Falls or Coraopolis, Pennsylvania. The load arrived on approximately October 15, 1982, and was accepted.

5. On October 15, 1982, at 2:15 p.m., the 672 lugs of Zinfandel and Muscat grapes were subjected to a federal inspection, which revealed as follows, in pertinent part:

Condition of Load: Each lot: Many lugs wet some leaking.

Temperature of Product: Various locations: 40° F. to 43° F.

CONDITION: Each lot: Berries mostly firm and firmly attached to capstems. Stems green. Zinfandel lot: From 10 to 30%, average 20% serious damage by crushed, wet and leaking berries. From 30 to 60%, average 46% serious damage by wet sticky berries, wet and sticky from juice of decayed and leaking berries. Average 4% raisining. From 5 to 25%, average 12% decay. Muscat Lot: Berries mostly light green, some straw color. From 9 to 30%, average 17% serious damage by crushed, wet, leaking berries. From 25 to 60%, average 40% serious damage by wet, sticky berries, wet and sticky from juice of decayed and leaking berries. Average 3% raisining. From 5 to 25%, average 16% decay. In each lot decay is Gray Mold Rot, advanced stages, some nested.

6. In a letter dated October 25, 1982, respondent notified complainant that it had resold the grapes to numerous buyers for \$7 per lug for a total of \$5,040 in gross proceeds. Respondent enclosed invoices reflecting these resales, most of which occurred on October 16, 1982. Respondent stated that it had deducted from the gross proceeds \$1,728 for freight and \$1 per lug, or \$720, for handling, for net proceeds of \$2,592. Respondent stated that a check for this amount was enclosed with the letter. However, the alleged check is not contained in the record and there is no evidence that such check was ever received by complainant.

7. Respondent sent a check to complainant for \$2,239.20 dated February 4, 1983, which was accepted by complainant as the undisputed amount owing, pursuant to an agreement with respondent. Respondent, to date, has failed to pay the difference between this sum and the contract price, or \$3,600.

8. A formal complaint was filed on March 25, 1983, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

This was an f.o.b. sale from complainant to respondent of 720 lugs of grapes for \$5,839.20. In its informal complaint, complainant contends that the contract terms were f.o.b. acceptance f.i.n.l., but such contention is not repeated in the formal complaint and we thus conclude that complainant is no longer maintaining this position. The parties disagree concerning the place to where the grapes were to be shipped, complainant asserting Beaver Falls, Pennsylvania, and respondent, Coraopolis, Pennsylvania, but the difference is immaterial as these two locations are only twenty miles apart. In its answer, respondent admits that it accepted the grapes, but denies that it owes the contract price because of the poor condition of the grapes upon arrival.

Since respondent accepted the grapes, it became liable for the contract price, less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Tony Misita & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). In this f.o.b. sale, complainant is held to have given an implied warranty of suitable shipping condition, which is defined in the Regulations as meaning that "the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j). The October 15, 1982, federal inspection shows the 672 lugs of Zinfandel and Muscat grapes to have been in extremely poor condition, with a large portion of the load crushed and decayed. Although the 48 lugs of Alicante grapes were not subjected to the inspection, the overall dismal condition of the load would not have been significantly altered even if the Alicante grapes were present and in perfect condition. The inspection's finding that the grapes suffered damage due to crushing might indicate abnormal transportation conditions, which could void the suitable shipping condition warranty, but this allegation has not been made by complainant and there is no evidence in the record that would compel us to reach this conclusion. Therefore, based on the October 15, 1982, inspection, it is our determination that a breach of the suitable shipping condition warranty was committed by complainant.

Respondent's damages resulting from complainant's breach are the difference between the actual value of the grapes and the value they would have had if they had been as warranted. See *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1208 (1982). The actual value of the grapes is usually deter-

by the proceeds of a prompt and proper resale. Respondent submitted evidence that the 720 lugs of grapes were sold for \$7.50 per lug or \$5,420, largely on October 16, 1982, which we consider to constitute a prompt and proper resale. The value of the grapes if they had been as warranted can be obtained from the Market Service Reports for Pittsburgh, Pennsylvania, on October 15, the date of delivery. The Reports show the value of the grapes at issue to have been \$12 to \$13 per lug. In calculating the value of the 720 lugs, we will use the lower figure of \$12 per lug, which results in a total of \$8,640. Therefore, respondent's damages resulting from complainant's breach are \$8,640 less \$5,420, or \$3,220. On October 25, 1982, letter, respondent also claims damages for freight expense and a handling charge, but these expenses are payable only when goods are being handled for the account of another party, which was not the case here where respondent had accepted the grapes and was reselling them for its own account. Therefore, respondent is liable for the contract price of \$5,839.20, less the \$3,220 in damages resulting from complainant's breach of warranty, or \$2,619.20. Respondent has paid complainant \$2,239.20 and thus owes an additional \$380. Respondent's failure to pay this amount is a violation of the section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, \$380, with interest thereon at a rate of 13 per cent per annum from November 1, 1982, until

SUNKIST GROWERS INC. v. TOM LANGE COMPANY INC. PACA Docket No. 2-6320. Decided March 2, 1984.

to pay—breach of warranty—Decision.

Respondent claimed that it was not liable for the contract price less damages because of a discrepancy as to the contracted destination, and that complainant breached this warranty because produce did not make good shipment to West Virginia where respondent had the shipment diverted. Respondent failed to prove a breach of warranty is found liable for full contract price.

Moore, Esquire, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$274.80 in connection with the sale of a quantity of grapefruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement, respondent filed an answering statement and complainant filed a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Sunkist Growers, Inc., is a corporation whose address is P.O. Box 7888, Van Nuys, California.
2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P.O. Box 20526, 5012 E. 62nd Street, Indianapolis, Indiana. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On July 19, 1982, complainant sold to respondent 175 cartons of ruby grapefruit at \$7.50 per carton and 100 cartons of white grapefruit at \$6.00 per carton plus \$44.00 for Vexar bugs, for a total of \$1,956.50 f.o.b. Shipment was to be made to respondent in Indianapolis, Indiana.
4. The 275 cartons of grapefruit were shipped on July 20, 1982, from complainant in interstate commerce to respondent in Indianapolis, Indiana, but were diverted to respondent's customer in Huntington, West Virginia, where they arrived on July 25, 1982.
5. Upon arrival of the grapefruit at Huntington, West Virginia, respondent complained to complainant about its condition and informed complainant that a federal inspection had been called for.

6. On July 25, 1982, at 8:15 a.m., the grapefruit was federally inspected with the following results, in pertinent part:

* * * * *

Temperature of Product: Range from 40 to 47°F.

Condition: *White Lot*: Mostly firm. 6 to 18%, per sample, average 11% damage by bruising. 18 to 33% per sample average 25% soft mushy fruit with watersoaked transparent appearance. Average 2% decay. *Ruby Lot*: Mostly firm. 3 to 12% in most samples, none in many, average 5% damage by bruising. 6 to 21% in most samples, none in many, average 11% mushy fruit with watersoaked areas affecting skin. Average 1% decay.

Remarks: Inspection made during process of unloading.

After the inspection the grapefruit was unloaded and accepted. The inspection results were conveyed to complainant, which refused to grant an allowance. On July 26, 1982, a second inspection occurred, with essentially the same results as the first.

7. Respondent paid \$1,681.70 to complainant, after deducting \$274.80 which it claimed as an allowance. Respondent's check was not offered as payment in full, and complainant accepted the check as partial payment of the amount allegedly due.

8. A formal complaint was filed on March 10, 1983, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny accepting the grapefruit, but claims that its failure to pay \$274.80 of the contract price of \$1,966.50 was justified due to the poor condition of the grapefruit upon arrival at the place of business of its customer in Huntington, West Virginia. Complainant contends that Indianapolis, Indiana was the contract destination. Complainant further contends that the condition problems resulted from freezing occurring during transit.

Respondent, having admittedly accepted the grapefruit, is liable for the agreed upon contract price less damages due to any breach of warranty committed by complainant. Respondent has the burden of proving both the breach and damages by a preponderance of the evidence. *Tony Misita and Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). Complainant, the seller in this f.o.b. transaction, gave respondent an implied warranty of suitable shipping condition, which means that "the commodity at the time of billing is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without

abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j).

Respondent, in effect, is arguing that complainant breached the warranty of suitable shipping condition. However, this warranty extends only to the contract destination agreed upon between the parties. Complainant claims in its complaint that the contract destination was respondent's place of business in Indianapolis, Indiana. Respondent disagrees, contending that it was understood that the grapefruit was to be shipped to its customer in Huntington, West Virginia. The truck driver's manifest, presented as evidence by both parties, sheds light on this issue, as it contains under the heading "DESTINATION" the designation "INDIANAPOLIS." In view of this evidence, we conclude that Indianapolis was the agreed upon destination. Therefore, complainant's warranty of suitable shipping condition did not extend to Huntington, West Virginia, to where the shipment was diverted by respondent. *Burnand & Co., Inc. v. Essential Produce International Corp. and/or Grand Prairie Produce Brokerage, Inc.*, 34 Agric. Dec. 1021 (1975).

Even if we were to consider complainant's warranty to have extended to the condition of the grapefruit at Huntington, West Virginia, which we do not, we would nonetheless conclude that respondent has failed to sustain its burden of proving a breach of this warranty. This is evident from the condition of the grapefruit as revealed by the July 25 and 26, 1982, federal inspections. These inspections indicate damage due to soft, mushy fruit with a water-soaked appearance and, to a lesser extent, bruising. The parties agree that this type of damage is caused by freezing. Respondent claims that the freezing occurred prior to shipment, while complainant asserts that the damage is representative of freezing during transit. Complainant has entered into evidence the affidavit of a Loren Weatherwax, the packinghouse manager of Royal Citrus, a member packinghouse of complainant, who states that he loaded the grapefruit at issue on board the truck. Weatherwax asserts that prior to loading, the fruit was stored at a temperature of between 50° and 52°F. Respondent has not offered any evidence to dispute this affidavit. If the freezing damage did not take place while the grapefruit was being stored, it is highly doubtful that it could have occurred prior to the grapefruit being loaded on the truck, considering that these events were taking place in California during the height of the summer. In addition, respondent has not provided any evidence that the temperature during transit did not fall below freezing. Respondent's only argument is that the temperature revealed by July 25, 1982, inspection, 40° to 47°F., signifies that the grapefruit could not have been frozen while on the truck.

However, it is quite possible that certain parts of the truck could have become colder during shipment than the temperature revealed by the inspection upon arrival. In any case, respondent has the burden to prove that the freeze damage resulted from conditions that occurred at shipping point and, based on the evidence in the record, it is clear that this burden has not been met by respondent.

We, therefore, conclude that respondent has not sustained its burden of proving any breach of warranty by complainant. Respondent is thus liable for the contract price of \$1,966.50 less the amount already paid of \$1,681.70, or \$274.80. Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$274.80, with interest thereon at the rate of 13 per cent per annum from September 1, 1982, until paid.

Copies of this order shall be served upon the parties.

In Re: RITCLO PRODUCE INC. v. JOHN LIVACICH PRODUCE INC. and/or LARRY ELMER INC., PACA Docket No. 2-6476. Decided March 2, 1984.

Failure to pay—Decision.

Respondents answered complaint admitting liability for a portion of the amount claimed by complainant. It is ordered the undisputed portion to be paid, and the disputed portion is left for subsequent decision same as if no order for the payment of the undisputed amount had been issued.

James A. Sata, Nogales Arizona, for complainant.

Robert A. Hetcher, Santa Maria, California, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed on August 25, 1983, in which complainant seeks to recover \$53,166.40 which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondents in March and April 1983. The complaint is brought jointly and

severally against both respondents. Respondents filed an answer to the formal complaint on February 8, 1984, admitting that respondent Larry Elmer Inc. is liable for \$30,733.40 of the amount claimed by complainant in connection with the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent Larry Elmer Inc. shall pay to complainant, as an undisputed amount, \$30,733.40. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1 1983, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

The liability of respondent Larry Elmer Inc. for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Since the complaint alleges joint and several liability on the part of both respondents, the joint and several liability of John Livacich Produce Inc. for the entire amount of the complaint is unaffected by this order.

QUINCY CORPORATION, d/b/a QUINCY FARMS v. DOMINIC II, d/b/a TEXAS NATIONAL PRODUCE SPECIALIST, and/or JENNY L. WOOLERY d/b/a TEXAS NATIONAL PRODUCE SPECIALISTS, and/or DOMINIC CUSUMANO II and JIMMY L. WOOLERY d/b/a TEXAS NATIONAL PRODUCE SPECIALIST. PACA Docket No. 2-6209. Decided March 7, 1984.

Failure to pay—Decision.

Respondent received and accepted produce shipped by the complainant and paid only a portion of the invoice leaving a balance due. Respondent admits liability for the remaining unpaid portion of the invoice and is ordered to pay.

Complainant, *pro se*.

Respondent, *pro se*.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents, jointly and severally in the total amount of \$8,389.28 in connection with the sale of six truckloads of fresh mushrooms in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondents. A copy of the report of investigation was also served upon complainant. Respondents, Dominic Cusumano II and Jimmy L. Wolery, filed answers to the complaint in which they denied any liability to complainant. Respondent Dominic Cusumano, II denied that he had done business as Texas National Produce Specialists, either individually or in partnership with Jimmy L. Wolery. Instead, Dominic Cusumano II alleged that Texas National Produce Specialists was wholly owned and operated by Jimmy L. Wolery. Jimmy L. Wolery in his answer denied doing business as Texas National Produce Specialists either individually or in partnership with Dominic Cusumano II. Jimmy L. Wolery alleged that Texas National Produce Specialists was wholly owned and operated by Dominic Cusumano II.

The amount involved in this proceeding does not exceed \$15,000 and consequently the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure complainant filed an opening statement and respondent, Dominic Cusumano II, filed an answering statement. Complainant also filed a statement in reply and respondent, Dominic Cusumano II, filed a sworn statement in answer thereto. Complainant, Dominic Cusumano II, and Jimmy L. Wolery each filed a brief.

FINDINGS OF FACT

1. Complainant, Quincy Corporation, is a corporation doing business as Quincy Farms, whose address is Route 4, P.O. Box 245, Quincy, Florida.

2. Respondent, Dominic Cusumano II, is an individual whose address is 17266 Mack Avenue, Grosse Pointe, Michigan.

3. Respondent, Jimmy L. Wolery, is an individual whose address is P.O. Box 73, Highway 77 N, Texas Mushroom Road, Waxahachie, Texas.

4. Respondent, Texas National Produce Specialists, is a partnership composed of Dominic Cusumano II and Jimmy L. Wolery, whose address at the time of the transactions involved herein, was 3605 E. Kiest Boulevard, Dallas, Texas. At the time of the transactions involved herein, this respondent was not licensed under the Act, but was operating subject to license.

5. Between April 14, 1982, and April 28, 1982, complainant sold to respondents, Dominic Cusumano II and Jimmy L. Wolery d/b/a Texas National Produce Specialists, six truckloads of fresh mushrooms having a total invoice price of \$14,457.80. Respondent partnership accepted the mushrooms on arrival, and made payments and received credits in the total amount of \$6,068.52, which leaves a balance still due and owing to complainant of \$8,389.28.

6. The formal complaint was filed on November 2, 1982, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brought this action against respondents jointly and severally but in its opening statement stated that it is complainant's position that Dominic Cusumano II and Jimmy L. Wolery operated Texas National Produce Specialists, as a partnership. In addition, complainant's Vice-President in charge of sales and marketing, Brian Harrington, stated under oath that he was told in person by Dominic Cusumano II that Texas National Produce Specialists was a partnership consisting of Dominic Cusumano II and Jimmy L. Wolery. Dominic Cusumano II and Jimmy L. Wolery both denied that they were a partnership, and also both denied that they were individually owners of Texas National Produce Specialists. Instead, Jimmy L. Wolery alleges that Dominic Cusumano II was the sole owner of Texas National Produce Specialists, and Dominic Cusumano II alleges that Jimmy L. Wolery was the sole owner of Texas National Produce Specialists. There was admitted into evidence as an exhibit to several of the sworn statements a copy of a certification made by Jimmy L. Wolery to the State of Texas entitled "Assumed Name Records Certificate of Ownership For Unincorporated Business Or Profession". This certificate stated that Texas National Produce Specialists was a proprietorship, and included a "certificate of ownership" with a list of the "names of owners". The only name given on the list was that of Jimmy L. Wolery, and Jimmy L. Wolery also signed next to his name.

Under this interim policy, complainant will be permitted to determine the facts as to respondent's late payment and present compliance. However, it is presumed that the administrative officials will properly discharge their administrative duties, in this respect. And a respondent is in no position to complain where its proven violations warrant revocation of its license even if full payment is finally made after the opening of the hearing.

For example, in the present case, even if respondent were to make full payment within a few days after the filing of this decision, respondent's violations would, nonetheless, be so flagrant and repeated as to warrant revocation of its license, in view of the large sums of money involved in the violations and the lengthy delays in making full payment. See *Reese Sales Co. v. Hardin*, 458 F.2d 183, 184-87 (9th Cir. 1972) (Judicial Officer properly denied petition for rehearing and reconsideration where respondent's license was revoked for failure to pay \$19,059.08 to nine sellers in 26 transactions, and full payment was not made until a few days after the final decision).

The imposition of a suspension order, rather than a revocation order, in flagrant and repeated "slow pay" cases is not mandated by the Act but, rather, is a self-imposed limitation, which is admittedly experimental. *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-73 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133-34 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). Where a respondent has committed repeated and flagrant violations of the magnitude involved here, this self-imposed limitation would not be followed if a determination as to whether full payment was finally made (long after the hearing) would require the lengthy delay incident to a reopened hearing, a new Administrative Law Judge's decision, and a further appeal to the Judicial Officer.

In the present case, if respondent makes full payment within the period set forth above, and complainant certifies such payment and present compliance, the revocation order will be changed to an 80-day suspension order. See *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. ____ (Dec. 5, 1983). However, if a new hearing were required to determine full payment and present compliance, the Judicial Officer would follow *Reese* and deny a petition for rehearing or reconsideration, in order to avoid further risk and damage to the industry.²⁷

²⁷ The *Reese* case afforded the present respondent an opportunity to learn that under existing policy, full payment made after the final decision would not be considered.

Following the *Reese* case and refusing to consider respondent's payments made after the filing of this decision would not be imposing a more severe sanction on respondent than on others. But even if a more severe sanction policy were to be adopted in a particular case, without prior warning to the regulated industry, that would be in accordance with the Department's sanction policy, which provides (*In re Worsley*, 33 Agric. Dec. 1547, 1569-70 (1974) (Appendix, at 24a-26a):

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller v. Securities and Exchange Commission*, 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n v. WOKO*, 329 U.S. 223, 228; *Continental Broadcasting v. Federal Comm. Comm'n.*, 439 F.2d 580, 582-584 (C.A. D.C.); *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.

In *Communications Comm'n v. WOKO*, 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in

determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Similarly, in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

As I stated in *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 848, 850 (1972):

In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

Following respondent's "appeal," complainant's attorney sent a letter, certified mail-return receipt requested, to respondent's president on February 24, 1984, which states in its entirety:

This letter is written to advise you of the holding by the Judicial Officer in *In re: Gilardi Truck & Transportation, Inc.*, in his Decision and Order dated January 27, 1984. A copy of that Decision and Order is attached. I particularly refer you to pages 42 through 49 of the opinion.

If within 30 days from your receipt of this letter Clarence Miller Co., Inc. has not paid *all* produce debts alleged in the case against it, and is not also current with respect

to all other produce debts, complainant will immediately seek on this appeal to have the license of Clarence Miller Co., Inc., revoked. In any event, complainant will demand a suspension of the license even if such debts are paid. The only evidence which complainant will consider sufficient to cause it to ascertain the accuracy of any allegation of complete compliance will be a sworn affidavit to that effect, which affidavit must be sufficient to subject the maker to judicial action if it is untrue.

The letter was received on February 28, 1984, but no response has been made to the letter. Accordingly, a revocation order is warranted for respondent's wilful, repeated and flagrant violations of the Act.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on respondent.

In Re: R. H. PRODUCE INC. PACA Docket No. 2-6069, Decided April 23, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

On April 23, 1984, respondent filed a petition for reconsideration of the decision and order filed in this proceeding on April 6, 1984. The petition merely reargues matters fully considered by the Judicial Officer when the decision and order was filed, and it is denied for the reasons set forth in the decision filed herein.

Respondent argues that it entered into payment agreements with sellers "shortly after produce was received and negotiations concluded between the parties" (Petition for Reconsideration, at 4). But as explained in the decision filed in this proceeding, such agreements did not extend the 10-day period for making full payment since the payment agreements were not made at the time the original sales contracts were made. Hence respondent violated the Act and regulations unless it made "full payment" within 10 days after the day on which the produce was accepted. 7 CFR § 46.2(u)(1). That was not done.

Respondent contends that it "paid its creditors in a number of ways, including promissory notes, payments to the shipper's growers, direct payments and cancellation of [debts] owing to the Respondent, among other methods" (Petition for Reconsideration, at 6). Respondent could lawfully have used a variety of methods to make "full payment. However, irrespective of the method respondent used to make "full payment," such "full payment" must have been fully consummated within 10 days after the day on which the produce was accepted, to constitute "full payment promptly."

For example, if respondent gave a promissory note, it would have to pay the promissory note in full within 10 days. If respondent paid the shipper's growers, it would have to make such payment within 10 days. Admittedly, respondent did not completely perform what needed to be performed to fulfill its obligations to the sellers within 10 days after the day on which the produce was accepted. Hence respondent violated its duty under the Act and regulations to make "full payment promptly," i.e., within 10 days after the day on which the produce was accepted.

Since respondent's petition merely reargues matters previously presented to the Judicial Officer, the order should become effective on the same day previously specified.

ORDER

Respondent's petition for reconsideration is denied.

No change shall be made in the effective date of the order previously specified.

Copies hereof shall be served upon the parties.

REPARATION DECISIONS

MARRA & ASSOCIATES and STEVE M. VOLPE d/b/a VOLPE AND MARRO ASSOCIATES a/t/a ROYAL MADESA VINEYARDS v. CROWLEY SALES AND EXPORT Co., PACA Docket No. 2-6313. Decided March 2, 1984.

It is agreed by both the parties that a transaction took place. Respondents deny that it owes the contract price because of the poor condition of the grapes upon arrival. Upon inspection it was found that complainant had breached the suitable shipping condition warranty. Therefore, respondent is liable for contract price, less damages.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,600 in connection with the sale of a truckload of grapes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given the opportunity to submit additional evidence in the form of verified statements as well as briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Marra & Associates and Steve M. Volpe d/b/a Volpe & Marra Associates a/t/a Royal Madera Vineyards, is a partnership whose address is 7770 Road 33, Madera, California.
2. Respondent, Crowley Sales & Export Co., is a corporation whose address is Box 827, Watsonville, California. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On approximately October 11, 1982, complainant sold to respondent a truckload of grapes consisting of 48 lugs of Alicante at \$7.20 per lug, or \$345.60, 336 lugs of Muscat at \$7.20 per lug, or \$2,419.20, and 336 lugs of Zinfandel at \$7.65 per lug, or \$2,570.40,

plus \$.70 per lug precooling and palletizing, or \$504, totalling \$5,839.20 f.o.b.

4. On approximately October 12, 1982, complainant shipped the load of grapes in interstate commerce to respondent's customer in either Beaver Falls or Coraopolis, Pennsylvania. The load arrived on approximately October 15, 1982, and was accepted.

5. On October 15, 1982, at 2:15 p.m., the 672 lugs of Zinfandel and Muscat grapes were subjected to a federal inspection, which revealed as follows, in pertinent part:

Condition of Load: Each lot: Many lugs wet some leaking.

Temperature of Product: Various locations: 40° F. to 43° F.

CONDITION: Each lot: Berries mostly firm and firmly attached to capstems. Stems green. Zinfandel lot: From 10 to 30%, average 20% serious damage by crushed, wet and leaking berries. From 30 to 60%, average 46% serious damage by wet sticky berries, wet and sticky from juice of decayed and leaking berries. Average 4% raisining. From 5 to 25%, average 12% decay. Muscat Lot: Berries mostly light green, some straw color. From 9 to 30%, average 17% serious damage by crushed, wet, leaking berries. From 25 to 60%, average 40% serious damage by wet, sticky berries, wet and sticky from juice of decayed and leaking berries. Average 3% raisining. From 5 to 25%, average 16% decay. In each lot decay is Gray Mold Rot, advanced stages, some nested.

6. In a letter dated October 25, 1982, respondent notified complainant that it had resold the grapes to numerous buyers for \$7 per lug for a total of \$5,040 in gross proceeds. Respondent enclosed invoices reflecting these resales, most of which occurred on October 16, 1982. Respondent stated that it had deducted from the gross proceeds \$1,728 for freight and \$1 per lug, or \$720, for handling, for net proceeds of \$2,592. Respondent stated that a check for this amount was enclosed with the letter. However, the alleged check is not contained in the record and there is no evidence that such check was ever received by complainant.

7. Respondent sent a check to complainant for \$2,239.20 dated February 4, 1983, which was accepted by complainant as the undisputed amount owing, pursuant to an agreement with respondent. Respondent, to date, has failed to pay the difference between this sum and the contract price, or \$3,600.

8. A formal complaint was filed on March 25, 1983, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

This was an f.o.b. sale from complainant to respondent of 720 lugs of grapes for \$5,839.20. In its informal complaint, complainant contends that the contract terms were f.o.b. acceptance final, but such contention is not repeated in the formal complaint and we thus conclude that complainant is no longer maintaining this position. The parties disagree concerning the place to where the grapes were to be shipped, complainant asserting Beaver Falls, Pennsylvania, and respondent, Coraopolis, Pennsylvania, but the difference is immaterial as these two locations are only twenty miles apart. In its answer, respondent admits that it accepted the grapes, but denies that it owes the contract price because of the poor condition of the grapes upon arrival.

Since respondent accepted the grapes, it became liable for the contract price, less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Tony Misita & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). In this f.o.b. sale, complainant is held to have given an implied warranty of suitable shipping condition, which is defined in the Regulations as meaning that "the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j). The October 15, 1982, federal inspection shows the 672 lugs of Zinfandel and Muscat grapes to have been in extremely poor condition, with a large portion of the load crushed and decayed. Although the 48 lugs of Alicante grapes were not subjected to the inspection, the overall dismal condition of the load would not have been significantly altered even if the Alicante grapes were present and in perfect condition. The inspection's finding that the grapes suffered damage due to crushing might indicate abnormal transportation conditions, which could void the suitable shipping condition warranty, but this allegation has not been made by complainant and there is no evidence in the record that would compel us to reach this conclusion. Therefore, based on the October 15, 1982, inspection, it is our determination that a breach of the suitable shipping condition warranty was committed by complainant.

Respondent's damages resulting from complainant's breach are the difference between the actual value of the grapes and the value they would have had if they had been as warranted. See *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1208 (1982). The actual value of the grapes is usually deter-

mined by the proceeds of a prompt and proper resale. Respondent has submitted evidence that the 720 lugs of grapes were sold for \$7 per lug or \$5,420, largely on October 16, 1982, which we consider to constitute a prompt and proper resale. The value of the grapes if they had been as warranted can be obtained from the Market News Service Reports for Pittsburgh, Pennsylvania, on October 15, 1982, the date of delivery. The Reports show the value of the grapes at issue to have been \$12 to \$13 per lug. In calculating the value of the 720 lugs, we will use the lower figure of \$12 per lug, which results in a total of \$8,640. Therefore, respondent's damages arising from complainant's breach are \$8,640 less \$5,420, or \$3,220. In its October 25, 1982, letter, respondent also claims damages for its freight expense and a handling charge, but these expenses are deductible only when goods are being handled for the account of another, which was not the case here where respondent had accepted the grapes and was reselling them for its own account.

Therefore, respondent is liable for the contract price of \$5,839.20, less the \$3,220 in damages resulting from complainant's breach of warranty, or \$2,619.20. Respondent has paid complainant \$2,239.20 and thus owes an additional \$380. Respondent's failure to pay this amount is a violation of the section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$380, with interest thereon at the rate of 13 per cent per annum from November 1, 1982, until paid.

SUNKIST GROWERS INC. v. TOM LANGE COMPANY INC. PACA Docket
No. 2-6320. Decided March 2, 1984.

Failure to pay—breach of warranty—Decision.

Respondent claimed that it was not liable for the contract price less damages because of a discrepancy as to the contracted destination, and that claimant breached this warranty because produce did not make good shipment to West Virginia where respondent had the shipment diverted. Respondent failed to prove a breach of warranty is found liable for full contract price.

Thomas Moore, Esquire, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$274.80 in connection with the sale of a quantity of grapefruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement, respondent filed an answering statement and complainant filed a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Sunkist Growers, Inc., is a corporation whose address is P.O. Box 7888, Van Nuys, California.
2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P.O. Box 20526, 5012 E. 62nd Street, Indianapolis, Indiana. At the time of the transaction involved herein, respondent was licensed under the Act.
3. On July 19, 1982, complainant sold to respondent 175 cartons of ruby grapefruit at \$7.50 per carton and 100 cartons of white grapefruit at \$6.00 per carton plus \$44.00 for Vexar bags, for a total of \$1,956.50 f.o.b. Shipment was to be made to respondent in Indianapolis, Indiana.
4. The 275 cartons of grapefruit were shipped on July 20, 1982, from complainant in interstate commerce to respondent in Indianapolis, Indiana, but were diverted to respondent's customer in Huntington, West Virginia, where they arrived on July 25, 1982.
5. Upon arrival of the grapefruit at Huntington, West Virginia, respondent complained to complainant about its condition and informed complainant that a federal inspection had been called for.

6. On July 25, 1982, at 8:15 a.m., the grapefruit was federally inspected with the following results, in pertinent part:

* * * * *

Temperature of Product: Range from 40 to 47°F.

Condition: *White Lot*: Mostly firm. 6 to 18%, per sample, average 11% damage by bruising. 18 to 33% per sample average 25% soft mushy fruit with watersoaked transparent appearance. Average 2% decay. *Ruby Lot*: Mostly firm. 3 to 12% in most samples, none in many, average 5% damage by bruising. 6 to 21% in most samples, none in many, average 11% mushy fruit with watersoaked areas affecting skin. Average 1% decay.

Remarks: Inspection made during process of unloading.

After the inspection the grapefruit was unloaded and accepted. The inspection results were conveyed to complainant, which refused to grant an allowance. On July 26, 1982, a second inspection occurred, with essentially the same results as the first.

7. Respondent paid \$1,681.70 to complainant, after deducting \$274.80 which it claimed as an allowance. Respondent's check was not offered as payment in full, and complainant accepted the check as partial payment of the amount allegedly due.

8. A formal complaint was filed on March 10, 1983, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

Respondent does not deny accepting the grapefruit, but claims that its failure to pay \$274.80 of the contract price of \$1,966.50 was justified due to the poor condition of the grapefruit upon arrival at the place of business of its customer in Huntington, West Virginia. Complainant contends that Indianapolis, Indiana was the contract destination. Complainant further contends that the condition problems resulted from freezing occurring during transit.

Respondent, having admittedly accepted the grapefruit, is liable for the agreed upon contract price less damages due to any breach of warranty committed by complainant. Respondent has the burden of proving both the breach and damages by a preponderance of the evidence. *Tony Misita and Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). Complainant, the seller in this f.o.b. transaction, gave respondent an implied warranty of suitable shipping condition, which means that "the commodity at the time of billing is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without

abnormal deterioration at the contract destination agreed upon between the parties." 7 CFR 46.43(j).

Respondent, in effect, is arguing that complainant breached the warranty of suitable shipping condition. However, this warranty extends only to the contract destination agreed upon between the parties. Complainant claims in its complaint that the contract destination was respondent's place of business in Indianapolis, Indiana. Respondent disagrees, contending that it was understood that the grapefruit was to be shipped to its customer in Huntington, West Virginia. The truck driver's manifest, presented as evidence by both parties, sheds light on this issue, as it contains under the heading "DESTINATION" the designation "INDIANAPOLIS." In view of this evidence, we conclude that Indianapolis was the agreed upon destination. Therefore, complainant's warranty of suitable shipping condition did not extend to Huntington, West Virginia, to where the shipment was diverted by respondent. *Burnand & Co., Inc. v. Essential Produce International Corp. and/or Grand Prairie Produce Brokerage, Inc.*, 34 Agric. Dec. 1021 (1975).

Even if we were to consider complainant's warranty to have extended to the condition of the grapefruit at Huntington, West Virginia, which we do not, we would nonetheless conclude that respondent has failed to sustain its burden of proving a breach of this warranty. This is evident from the condition of the grapefruit as revealed by the July 25 and 26, 1982, federal inspections. These inspections indicate damage due to soft, mushy fruit with a water-soaked appearance and, to a lesser extent, bruising. The parties agree that this type of damage is caused by freezing. Respondent claims that the freezing occurred prior to shipment, while complainant asserts that the damage is representative of freezing during transit. Complainant has entered into evidence the affidavit of a Loren Weatherwax, the packinghouse manager of Royal Citrus, a member packinghouse of complainant, who attests that he loaded the grapefruit at issue on board the truck. Weatherwax asserts that prior to loading, the fruit was stored at a temperature of between 50° and 52°F. Respondent has not offered any evidence to dispute this affidavit. If the freezing damage did not take place while the grapefruit was being stored, it is highly doubtful that it could have occurred prior to the grapefruit being loaded on the truck, considering that these events were taking place in California during the height of the summer. In addition, respondent has not provided any evidence that the temperature during transit did not fall below freezing. Respondent's only argument is that the temperature revealed by July 25, 1982, inspection, 40° to 47°F., signifies that the grapefruit could not have been frozen while on the truck.

er, it is quite possible that certain parts of the truck could become colder during shipment than the temperature recorded by the inspection upon arrival. In any case, respondent has been denied to prove that the freeze damage resulted from condensation that occurred at shipping point and, based on the evidence in the record, it is clear that this burden has not been met by respondent.

Therefore, conclude that respondent has not sustained its burden of proving any breach of warranty by complainant. Respondent is thus liable for the contract price of \$1,966.50 less the amount already paid of \$1,681.70, or \$274.80. Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$274.80, with interest thereon at the rate of 13 per cent per annum from September 1, 1982, until paid. A copy of this order shall be served upon the parties.

RITCLO PRODUCE INC. v. JOHN LIVACICH PRODUCE INC. and/or
ELMER INC., PACA Docket No. 2-6476. Decided March 2,
1984.

Reparation to be paid—Decision.

Respondent answered complaint admitting liability for a portion of the amount claimed by complainant. It is ordered the undisputed portion to be paid, and the disputed portion is left for subsequent decision same as if no order for the reparation of the undisputed amount had been issued.

Sata, Nogales Arizona, for complainant.

Hetcher, Santa Maria, California, for respondent.

By Y. Stanton, Presiding Officer.

Attest by Donald A. Campbell, Judicial Officer

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A complaint was filed on August 25, 1983, in which complainant seeks to recover \$53,166.40 which amount is alleged to be the purchase price for tomatoes sold to and accepted by respondent in March and April 1983. The complaint is brought jointly and

severally against both respondents. Respondents filed an answer to the formal complaint on February 8, 1984, admitting that respondent Larry Elmer Inc. is liable for \$30,733.40 of the amount claimed by complainant in connection with the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent Larry Elmer Inc. shall pay to complainant, as an undisputed amount, \$30,733.40. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1 1983, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

The liability of respondent Larry Elmer Inc. for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Since the complaint alleges joint and several liability on the part of both respondents, the joint and several liability of John Livach Produce Inc. for the entire amount of the complaint is unaffected by this order.

QUINCY CORPORATION, d/b/a QUINCY FARMS v. DOMINIC II, d/b/a TEXAS NATIONAL PRODUCE SPECIALIST, and/or JENNY L. WOOLERY d/b/a TEXAS NATIONAL PRODUCE SPECIALISTS, and/or DOMINIC CUSUMANO II and JIMMY L. WOOLERY d/b/a TEXAS NATIONAL PRODUCE SPECIALIST. PACA Docket No. 2-6209. Decided March 7, 1984.

Failure to pay—Decision.

Respondent received and accepted produce shipped by the complainant and paid only a portion of the invoice leaving a balance due. Respondent admits liability for the remaining unpaid portion of the invoice and is ordered to pay.

Complainant, *pro se*.

Respondent, *pro se*.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents, jointly and severally in the total amount of \$8,389.28 in connection with the sale of six truckloads of fresh mushrooms in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondents. A copy of the report of investigation was also served upon complainant. Respondents, Dominic Cusumano II and Jimmy L. Wolery, filed answers to the complaint in which they denied any liability to complainant. Respondent Dominic Cusumano, II denied that he had done business as Texas National Produce Specialists, either individually or in partnership with Jimmy L. Wolery. Instead, Dominic Cusumano II alleged that Texas National Produce Specialists was wholly owned and operated by Jimmy L. Wolery. Jimmy L. Wolery in his answer denied doing business as Texas National Produce Specialists either individually or in partnership with Dominic Cusumano II. Jimmy L. Wolery alleged that Texas National Produce Specialists was wholly owned and operated by Dominic Cusumano II.

The amount involved in this proceeding does not exceed \$15,000 and consequently the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure complainant filed an opening statement and respondent, Dominic Cusumano II, filed an answering statement. Complainant also filed a statement in reply and respondent, Dominic Cusumano II, filed a sworn statement in answer thereto. Complainant, Dominic Cusumano II, and Jimmy L. Wolery each filed a brief.

FINDINGS OF FACT

1. Complainant, Quincy Corporation, is a corporation doing business as Quincy Farms, whose address is Route 4, P.O. Box 245, Quincy, Florida.
2. Respondent, Dominic Cusumano II, is an individual whose address is 17266 Mack Avenue, Grosse Pointe, Michigan.

3. Respondent, Jimmy L. Wolery, is an individual whose address is P.O. Box 73, Highway 77 N, Texas Mushroom Road, Waxahachie, Texas.

4. Respondent, Texas National Produce Specialists, is a partnership composed of Dominic Cusumano II and Jimmy L. Wolery, whose address at the time of the transactions involved herein, was 3605 E. Kiest Boulevard, Dallas, Texas. At the time of the transactions involved herein, this respondent was not licensed under the Act, but was operating subject to license.

5. Between April 14, 1982, and April 28, 1982, complainant sold to respondents, Dominic Cusumano II and Jimmy L. Wolery d/b/a Texas National Produce Specialists, six truckloads of fresh mushrooms having a total invoice price of \$14,457.80. Respondent partnership accepted the mushrooms on arrival, and made payments and received credits in the total amount of \$6,068.52, which leaves a balance still due and owing to complainant of \$8,389.28.

6. The formal complaint was filed on November 2, 1982, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant brought this action against respondents jointly and severally but in its opening statement stated that it is complainant's position that Dominic Cusumano II and Jimmy L. Wolery operated Texas National Produce Specialists, as a partnership. In addition, complainant's Vice-President in charge of sales and marketing, Brian Harrington, stated under oath that he was told in person by Dominic Cusumano II that Texas National Produce Specialists was a partnership consisting of Dominic Cusumano II and Jimmy L. Wolery. Dominic Cusumano II and Jimmy L. Wolery both denied that they were a partnership, and also both denied that they were individually owners of Texas National Produce Specialists. Instead, Jimmy L. Wolery alleges that Dominic Cusumano II was the sole owner of Texas National Produce Specialists, and Dominic Cusumano II alleges that Jimmy L. Wolery was the sole owner of Texas National Produce Specialists. There was admitted into evidence as an exhibit to several of the sworn statements a copy of a certification made by Jimmy L. Wolery to the State of Texas entitled "Assumed Name Records Certificate of Ownership For Unincorporated Business Or Profession". This certificate stated that Texas National Produce Specialists was a proprietorship, and included a "certificate of ownership" with a list of the "names of owners". The only name given on the list was that of Jimmy L. Wolery, and Jimmy L. Wolery also signed next to his name.

FLORIDA TOMATO PACKERS INC. v. LISA INC. and/or VALENCIA
BROS. PRODUCE Co. PACA Docket No. 2-633. Decided March 8,
1984.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents, jointly and severally, in the amount of \$8,208 in connection with the sale of two truckloads of tomatoes to respondent Lisa, Inc., in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondents, each of which filed an answer thereto, denying liability to complainant. Respondent Valencia Bros. Produce Co., also filed a counterclaim for brokerage in connection with the two truckloads of tomatoes in the total amount of \$432. Complainant filed a reply to the counterclaim in which it did not deny owing the claimed brokerage to respondent Valencia Bros. Produce Co.

The amount claimed as damages herein does not exceed \$15,000, and accordingly, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure the verified pleadings are considered a part of the evidence herein as is the Department's report of investigation. In addition, the parties were given the opportunity to file sworn statements. However, none of the parties did so. None of the parties filed a brief.

FINDINGS OF FACT

1. Complainant, Florida Tomato Packers, Inc., is a corporation whose address is P.O. Box BB, Homestead, Florida. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Lisa, Inc., is a corporation whose address is P.O. Box 456, Nogales, Arizona. At the time of the transactions involved herein, this respondent was licensed under the Act.

3. Respondent, Ernest M. Valencia, is an individual doing business as Valencia Bros. Produce Co., whose address is P. O. Box 1324, Nogales, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.

4. On or about March 30, 1982, complainant sold to respondent Lisa, Inc., through respondent Valencia Bros. Produce Co., acting as broker, one truckload of tomatoes consisting of 1,440 25 lb. cartons of size 6x7's, 85% U.S. No. 1 quality, at \$4.50 per carton plus

\$.65 per carton for gassing and palletization, f.o.b., for shipment on April 6, 1982, with price and quality protected on arrival.

5. On April 6, 1982, complainant shipped the tomatoes referred to in Finding of Fact 4 to respondent Lisa, Inc., in Nogales, Arizona. The tomatoes were accepted by respondent Lisa, Inc. on arrival, and such respondent has paid complainant \$3,672.

6. On or about April 5, 1982, complainant sold to respondent, Lisa, Inc., through respondent, Valencia Bros. Produce Co., acting as broker, one truckload of tomatoes consisting of 360 cartons of size 6x6's at \$6.00 per carton, 720 cartons of size 6x7's at \$4.00 per carton, and 360 cartons of size 7x7's at \$3.00 per carton, plus \$.65 per carton for gassing and palletization, and \$20 for a temperature recorder, or a total of \$7,076, f.o.b., with price and quality protected on arrival.

7. On April 9, 1982, complainant shipped the tomatoes referred to in Finding of Fact 6 to respondent Lisa, Inc., in Nogales, Arizona. Respondent Lisa, Inc., accepted the tomatoes on arrival, and has paid complainant \$2,612 for them.

8. Complainant agreed to pay brokerage in the total amount of \$432 in connection with the two loads of tomatoes. No part of the brokerage has been paid.

9. The informal complaint was filed on July 2, 1982, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The parties herein agree as to the quantities of tomatoes sold and the dates and prices for which they were sold. They also agree that the tomatoes arrived in good condition without any quality or condition problems. However, both respondents maintain that the tomatoes were sold with price and quality protected on arrival. Complainant has forcefully maintained throughout these proceedings that no such terms were included as part of the contracts covering these two loads of tomatoes. The documentary evidence consisting chiefly of the invoices issued by complainant and the broker's confirmations of sale issued by respondent Valencia is in direct conflict, as are the statements of the parties. Upon close examination of all of the evidence submitted we find that the respondents have proven by a preponderance of the evidence that the contract terms included the provision for protection of price and quality on arrival.

In response to an inquiry from the Department, respondent Lisa, Inc., submitted copies of market reports in an effort to establish that there was a market decline as to the subject tomatoes which warranted the payment by this respondent of less than the original

invoice amounts. There are several substantial problems with the evidence relied upon by this respondent to substantiate market decline. First, nowhere in any of the evidence submitted by any of the parties to this proceeding was there any indication as to the arrival dates of the two loads of tomatoes. Since the protection for market decline was specifically applicable up to the point of arrival this is obviously the crucial date for our consideration. The Market News Service reports submitted by respondent Lisa, Inc., cover the period of time from April 6, 1982, through April 15, 1982. April 6 is the date of shipment of the first load, but not the date on which the contract was made and the initial prices set. The market reports do not show any quotations from Nogales, Arizona, and the closest market to Nogales, Arizona, for which quotations are shown covering Florida tomatoes in 25 lb. cartons is Dallas, Texas. An additional problem with the evidence offered by respondent Lisa, Inc., is that if we assume a normal travel time of four days between Florida and Arizona, and thus assume that the tomatoes in the first load arrived on April 10 (a Saturday) we find that the Dallas market reports show no decline in price between the earliest report which respondent supplied April 6, and April 12 (the first market day after arrival) for size 6x7 tomatoes in 25 lb. cartons from Florida. Such market reports show that such tomatoes were selling for \$7.50 to \$9.00 per carton on April 6, and \$7.50 to \$8.00 on April 12. Since we commonly use the bottom figure on destination market reports, respondent Lisa, Inc., has failed to establish that there was a market decline as to the first load.

The second load of tomatoes presents us with similar problems. Since the tomatoes on the second load were shipped on April 9, the assumed four day transit period requires that we use April 13, as the arrival date. The contract date was April 5, but again the earliest report supplied by respondent was April 6. The size 6x6 tomatoes show no decline in market price between April 6 and April 13, in Dallas. The 6x7 tomatoes also show no decline in price over the April 6 to April 13, period, and no quotations are given for size 7x7 tomatoes. We find that respondent Lisa, Inc., is liable to complainant for the balance of the f.o.b. price, or \$8,208. This respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

There is no basis in this record for any award in complainant's favor against respondent Valencia Bros. Produce Co. Instead, we find on the basis of all of the evidence that respondent Valencia negotiated a valid and binding contract between complainant and Lisa, Inc., and is entitled to the brokerage in the amount of \$432

which complainant agreed to pay at the time the contracts were entered into. Complainant's failure to pay respondent Valencia Bros. Produce Co. the sum of \$432 is a violation of section 2 of the Act for which reparation should be awarded to this respondent with interest.

ORDER

Within thirty (30) days from the date of this order, respondent Lisa, Inc., shall pay to complainant, as reparation, \$8,028, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

The complaint against the respondent Valencia Bros. Produce Co., is dismissed.

Within thirty (30) days from the date of this order, complainant shall pay to respondent Valencia Bros. Produce Co., as reparation, \$432, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

ROUSONELOS FARMS, *v.* THE OOST PRODUCE COMPANY, INC. PACA
Docket No. 2-6350. Decided March 8, 1984.

Complainant, *pro se.*

Burton Berger, Esquire, Chicago Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$54,384.60 in connection with the sale to respondent of 62 lots of mixed fruits and vegetables in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, in effect admitting liability to complainant, but contending that the amount claimed was incorrect and should be reduced by \$17,000.

Although the amount claimed in the formal complaint exceeds \$15,000, the parties have waived oral hearing, and the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of

the parties are considered a part of the evidence as is the Department's report of investigation. In addition, complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Rousonelos Farms, Inc., is a corporation whose address is P.O. Box 115, Plainfield Illinois.

2. Respondent, The Oost Produce Company, Inc., is a corporation whose address is 21 South Water Market Street, Chicago, Illinois. At the time of the transactions involved herein respondent was licensed under the act.

3. On or about August 23, 1982, through October 28, 1982, complainant consigned to respondent, to be sold for complainant's account, 62 lots of mixed perishable produce. Such produce was accepted and resold by respondent for complainant's account.

4. The net proceeds due from respondent to complainant as a result of the sales of the 62 lots of mixed perishable produce amount to \$54,334.60. No part of this amount has been paid by respondent to complainant.

5. The formal complaint was filed on April 27, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant alleges in the formal complaint that it consigned 62 lots of mixed perishable produce to respondent to be sold for complainant's account. Complainant presented extensive documentary evidence as to the value of such produce. Respondent in its answer to the formal complaint did not dispute the accuracy of the amount claimed by complainant, but rather contended that such amount was not due in its entirety because respondent had already paid to complainant \$7,000 on the last day in which it engaged in business and in addition had sold a jeep to complainant for the sum of \$10,000, but had endorsed back to complainant the check which respondent gave in payment for the jeep. This was the only defense which respondent offered to complainant's claim herein.

Complainant's president, Michael G. Rousonelos, alleged in a sworn opening statement that the \$7,000 payment referred to by respondent was applied to specific delivery ticket numbers (2851, 2853, 2854, 2855, and 2857) which were not included in the listing of delivery tickets in complainant's formal complaint, and therefore, were not a part of the claim for \$54,334.60. In addition Mr. Rousonelos stated that the \$10,000 amount referred to by respondent was applied to delivery tickets (2849, 2866, 2874, 3551, 3556, and

3572) which were not included in the delivery tickets, and amount of \$54,334.60; alleged to be due in the complaint. Respondent did not make any reply to these allegations. On the basis of the evidence we conclude that respondent owes complainant proceeds in the total amount of \$54,334.60. Respondent's failure to pay complainant such amount is a violation of section 2 of the act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$54,334.60, with interest thereon at the rate of 13 percent per annum from October 1, 1982, until payment.

ROBERT RUIZ INC. v. HALE BROTHERS, INC. and/or HUBERT H. NICHOLS CO., INC. PACA Docket No. 2-6288. Decided March 9, 1984.

The respondent received shipment of cabbages and sought to reject them on the ground of damage. The time limit for rejection had expired by the time the product reached its destination. Respondent is unable to prove any breach against complainant and is found liable for the contract price.

Complainant, *pro se*.

Respondent, *pro se*.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,420.00 against respondents in connection with the sale of one partial truckload of cabbage in interstate commerce.

A copy of the report of investigation was served upon the parties. A copy of the formal complaint was served upon respondents, one of which filed an answer thereto denying liability to complainant.

The amount involved in this proceeding does not exceed \$15,000.00, and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence, as is the Department's report of investigation. The parties were given an opportunity to be heard.

nity to submit further evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent, Hale Brothers, Inc., filed an answering statement. None of the parties filed a brief.

FINDINGS OF FACT

1. Complainant, Robert Ruiz, Inc., is a corporation whose address is P.O. Box 396, Edinburg, Texas.

2. Respondent, Hale Brothers, Inc., is a corporation whose address is P.O. Box 1048, Morristown, Tennessee. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent, Hubert H. Nall, Co. Inc., is a corporation whose address is Atlanta State Farmer's Market-108 Administration Building, Forest Park, Georgia. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On or about May 21, 1982, complainant sold and shipped to respondent Hale Brothers, Inc., through respondent Hubert H. Nall Co., Inc., acting as broker, one partial truckload of cabbage consisting of 265 sacks of cabbage at \$9.00 per sack, for a total of \$2,385.00, plus \$35.00 for top ice, or \$2,420.00, f.o.b.

5. The truck containing the cabbage arrived at respondent Hale Brothers, Inc.'s place of business in Morristown, Tennessee at approximately 8:00 pm May 25, 1982. This respondent failed to give timely notice of rejection to complainant, and thus accepted the cabbage.

6. The informal complaint was filed on July 15, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The record reveals that the truck on which the subject cabbage was shipped on May 21, 1982, returned to complainant's place of business on May 22, 1982, for the purpose of picking up additional produce. It is also evident from the record that upon arrival of the truck at its place of business, complainant's Richard Ruiz discovered that the cooling unit on the truck was defective, and that the truck was hot. Richard Ruiz contacted the broker and offered to take the 265 bags of cabbage off of the truck. This offer was not accepted, the cooling unit on the truck was subsequently repaired, and the additional produce was shipped on May 22, 1982, along with the original 265 bags of cabbage.

One of Hubert H. Nall Co., Inc.'s employees, Jerry Ragsdale, alleged in an unsworn letter to Richard Ruiz, that Mr. Ruiz admitted in a telephone conversation on June 1, 1982, that he was aware

that the refrigeration unit was not operating when the 265 bags of cabbage were loaded on May 21. However, this allegation, if true, does not amount to an allegation that complainant loaded the cabbage with knowledge that the refrigeration unit was defective. Refrigeration units do not operate continually, and the fact that a unit is not operating is not an indication that such unit is defective.

Complainant alleges that when it shipped the produce on May 22, 1982, respondent Hubert H. Nall Co., Inc., agreed to accept liability for the 265 bags of cabbage originally shipped on May 21, 1982. Respondent, Hubert H. Nall Co., Inc. denies that it ever made any such undertaking. We find that complainant has failed to meet its burden of proving by a preponderance of the evidence that any such undertaking was made by respondent, Hubert H. Nall Co., Inc.

Complainant also alleges that the 265 sacks of cabbage were accepted on arrival at destination, and that consequently respondent Hale Brothers, Inc. became liable for the full purchase price of such cabbage. Respondent Hale Brothers, Inc., maintains that the cabbage was not accepted on arrival, but that instead it communicated a rejection of such cabbage to complainant through respondent Hubert H. Nall Co., Inc. Respondent Hubert H. Nall Co., Inc., confirms this allegation. However, we have held many times that a rejection is not effective unless the buyer seasonably notifies the seller, and we have also held that the burden of proving seasonable notice rests with the buyer. See *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (1979) and *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979). In this case the broker has alleged that the truck arrived at approximately 8:00 p.m. on May 25, 1982, and that rejection was communicated to complainant on the following morning. The regulations provide that a reasonable time within which to accept produce shipped by truck is eight hours. See 7 CFR 46.2(bb) and (cc). Eight hours from 8 p.m. on May 25, would be 4:00 a.m. on May 26. The broker's allegation that rejection was communicated the morning of May 26 does not amount to even a definite allegation that seasonable notice of rejection was given, and it certainly falls short of proof of seasonable notice. Accordingly, we find that respondent Hale Brothers, Inc., accepted the subject cabbage.

Since respondent Hale Brothers, Inc., accepted the cabbage, it became liable to complaint for the full purchase price thereof less any damages flowing from any breach of contract proven by such respondent. Hale Brothers, Inc. has failed to prove a breach on two counts. First, there was no inspection of the cabbage at destination.

See *Mutual Vegetable Sales v. Select Distributors*, 38 Agric. Dec. 1359 (1979). Second, the record clearly establishes that the refrigeration unit was not working properly during the first day of transit, and consequently the warranty of suitable shipping condition normally applicable in a f.o.b. sale was voided by such abnormal transportation. See *Valley Packing Co. v. Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352 (1969). We conclude that respondent Hale Brothers, Inc., is liable to complainant for the full purchase price of the cabbage, or \$2,420.00. This respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. *Hubert H. Nall Co., Inc.* acted only as a broker, and accordingly the complaint against this respondent should be dismissed.

ORDER

Within 30 days from the date of this order, respondent Hale Brothers, Inc., shall pay to complainant, as reparation, \$2,420.00, with interest thereon at the rate of 13 percent per annum from June 1, 1982, until paid.

The complaint against respondent Hubert H. Nall, Co., Inc. is dismissed.

NATIVE AMERICAN FARMS v. AMERICAN EXPORT CO. INC. PACA Docket No. 2-6324 Decided March 9, 1984.

Respondents defense involved the accuracy of the invoice submitted for payment by the complainant, saying that it was overstated. On the boxes of all the evidence it was found that the invoices were accurate. Respondent was found liable for the contract price less any amount deducted for the cost of shipping produce that had previously been ordered, but not delivered.

Thomas Oliveria, Newport Beach California, for complainant.
Respondent, pro se.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of three truckloads of honeydew melons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount involved in the formal complaint does not exceed \$15,000 and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence as is the Department's report of investigation. In addition, complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, William Y. Murphey, doing business as Native American Farms, whose address is P.O. Drawer M, Blythe, California.

2. Respondent, American Export Co., Inc., is a corporation whose address is 778 Market Court, Los Angeles, California. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 12, 1982, complainant sold and shipped from loading point in Arizona to respondent in Los Angeles, California, one truck load of honeydew melons. The load consisted of 216 cartons of "Scoop" brand honeydews, size 6's, at \$6.00 per carton and 918 cartons of "Scoop" brand honeydews, size 5's at \$6.00 per carton, plus \$.25 per carton palletizing and \$35.00 for a temperature recorder, or a total of \$7,122.50, f.o.b.. On June 15, 1982, complainant sent respondent an invoice covering this load of honeydews showing the above prices.

4. On June 14, 1982, complainant sold and shipped from loading point in Arizona to respondent in Los Angeles, California, one truck load of honeydew melons. The load consisted of 1134 cartons of "Scoop" brand honeydews, size 5's at \$6.00 per carton, plus \$.25 for palletizing and \$35.00 for a temperature recorder, or a total of \$7,122.50 f.o.b.. On June 15, 1982, complainant sent respondent an invoice covering this load of honeydews showing the above prices.

5. On June 23, 1982, complainant sold and shipped from loading point in Arizona to respondent in Los Angeles, California, one truck load of honeydew melons. The load consisted of 1134 cartons of "Scoop" brand honeydews, size 5's, at \$4.00 per carton, plus \$.25 for palletizing and \$35.00 for a temperature recorder, or a total of \$4,854.50, f.o.b.. On June 26, 1982, complainant sent respondent an invoice covering this load of honeydews showing the above prices.

6. On or about June 18, 1982, respondent contracted to purchase from complainant two additional truckloads of honeydew melons. However, when the trucks secured by respondent were sent to complainant's place of business to pick up the honeydews, complainant failed to load the trucks. Complainant and respondent agreed subsequent to this failure, that respondent could deduct the \$1200 cost of the two trucks from complainant's invoice of June 26, 1982.

7. The informal complaint was filed on August 5, 1982, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent's principal defense to the claim of complainant is that the original contracts which it negotiated with complainant for the three loads of honeydews were each for a lower amount than the amounts claimed by complainant. Respondent claims that it was invoiced incorrectly for each of the three loads, and respondent's managing director Mr. Sam Perricone, Jr. submitted a sworn statement to that effect, and in addition stated that he personally called Mr. Richard Nakano (complainant's Sales Manager) after receiving each invoice and objected to the prices shown thereon. Mr. Perricone stated that he was told by Mr. Nakano to ignore the invoices and pay the amounts originally agreed upon. Mr. Nakano submitted sworn statements in direct contradiction to these allegations of Mr. Perricone, and since there was no written objection to the invoices sent by complainant, we find on the basis of all of the evidence that the prices shown in the invoices sent by complainant are the correct prices for the honeydews.

As an additional defense to complainant's action in regard to the last load of honeydews, respondent maintains that its Mr. Perricone was authorized by Mr. Nakano to make a deduction of \$1200 to cover freight charges on 2 trucks which were sent to pick up honeydews from complainant for which respondent had contracted, but which complainant failed to ship. Mr. Nakano never specifically denied this allegation, and we find on the basis of all of the evidence that respondent has adequately proven this defense. Consequently, the sum of \$1200 should be deducted from the original contract price of the June 23, 1982, load of honeydews.

Since respondent accepted the three loads of honeydews it became liable to complainant for the full contract price thereof, or \$19,099.50, less the \$1200 deduction authorized by complainant on the June 23 load, and less the \$15,132 which respondent has already paid to complainant, or a balance of \$2,767.50. Respondent's failure to pay complainant such amount is a violation of section 2

of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$2,767.50, with interest thereon at the rate of 13 per cent per annum from July 1, 1982, until paid.

JOS. CIMINO FOODS, INC. v. CHICAGO PRODUCE SUPPLIERS, INC. PACA
Docket No. 2-6346. Decided March 9, 1984.

Complainant alleges that respondent accepted 3 shipments of produce and failed to pay. Respondent issued an unsworn statement saying the invoice was overestimated, but admitting all other allegations, by default. The answer, being that it is unsworn and there was no other evidence submitted is not acceptable as conclusive and respondent is found liable for the contract price.

Complainant, *pro se*.

Respondent, *pro se*.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$15,585.00 against respondent in connection with three shipments of garlic, a perishable agricultural commodity, in interstate commerce.

A copy of the report of investigation was served on each of the parties. The respondent was also served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Although the amount claimed in the complaint exceeds \$15,000.00, the parties have waived oral hearing and therefore the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Jos. Cimino Foods, Inc., is a corporation whose mailing address is 95 Phelan Avenue, Unit #1, San Jose, California 95112.

2. Respondent, Chicago Produce Suppliers, Inc., is a corporation whose mailing address 1615 S. Peoria Street, Chicago, Illinois 60608. At all material times, respondent was licensed under the Act.

3. On or about December 15, 1982, complainant by oral contract sold respondent a partial truckload of garlic as follows: 75 cartons of bulk garlic (Giants), each weighing 30 pounds, at a delivered price of 66 cents per pound (\$1,485.85); 75 cartons of bulk garlic (Jumbo), each weighing 30 pounds, at a delivered price of 86 cents per pound (\$1,935); 75 cartons of bulk garlic (Jumbo), each weighing 30 pounds, at a delivered price of 96 cents per pound (\$2,160.00); and 20 cartons of 12/12/2 bulb Cello Box garlic at a delivered price of \$15.00 per box (\$300.00), for a total delivered price of \$5,880.00. The garlic was shipped by complainant from loading points in the State of California to respondent in Chicago, Illinois, and was received and accepted by respondent.

4. On or about January 7, 1983, complainant, by oral contract, sold respondent a partial truckload of garlic which consisted of the following: 150 12/12/2 bulb Cello Boxed garlic, "Cimino Brand," at a delivered price of \$15.00 per box (\$2,250); 200 30 pound bulk garlic (Giants), "San Joaquin Valley Brand," at a delivered price of 55 cents per pound (\$33,000); 50 30 pound bulk garlic (Jumbo), "Capital Brand," at a delivered price of 86 cents per pound (\$1,290); and 50 30 pound bulk garlic (X-Jumbo), "Capitol Brand," at a delivered price of 91 cents per pound (\$1,365), for a total delivered price of \$8,205. The garlic was shipped by complainant from loading points in the State of California to respondent in Chicago, Illinois. Respondent received and accepted the garlic.

5. On or about January 27, 1983, complainant, by oral contract, sold respondent 100 cartons of 12/12/2 bulb Cello Box packaged garlic, U.S. No. 1 grade, at an agreed delivered price of \$15.00 per box (\$1,500). The garlic was shipped from a loading point in California to respondent in Chicago, Illinois, and was received and accepted by respondent.

6. A formal complaint was filed on June 14, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The complainant alleges that respondent purchased, received, and accepted three shipments of garlic from it. Respondent does

not deny any of the allegations made by complainant except for alleging, in its unsworn answer, that the billing for the January 7, 1983, shipment should be \$6,975.00 rather than \$8,205.00. Since its answer is unsworn and respondent has submitted no other evidence on this point, we cannot accept its position. As to the remainder of complainant's allegations, respondent's failure to deny them and its failure to submit evidence refuting the allegations, leads us to conclude that it has admitted them. Therefore, on the basis of all of the evidence in the proceeding we find that respondent is obligated to complainant in the amount of \$15,585, or the sum of the contract prices for the three shipments of garlic, and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant \$15,585, as reparation, plus interest in the amount of 13 percent per annum from February 1, 1983, until paid.

CAL-MEX DISTRIBUTORS INC. *v.* POLO GUERRERO PRODUCE, PACA
Docket No. 2-7372. Decided March 9, 1984.

Complainant, *pro se*.

Alfonso Ibanez, Esquire, Edenburg, Texas, for respondent.

George S. Whitten, *Presiding Officer*.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$9,240 in connection with the sale and shipment to respondent of one truckload of pink tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant and asserting a counterclaim in the amount of \$1,991 arising out of the same transaction. Respondent filed a reply to the counterclaim denying any liability thereunder.

The amount involved in neither the complaint nor counterclaim exceeds \$15,000. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence as is the Department's report of investigation. In addition, complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent is an individual, Policarpio Guerrero, doing business as Polo Guerrero Produce, whose address is 421 S. Georgia Street, Mercedes, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about November 24, 1982, complainant sold to respondent one truckload containing 1,848 flats of pink, fresh, vine ripe tomatoes, Don Diego Brand, grown in Mexico, size 5x6, at \$5.00 per flat, or \$9,240 f.o.b.

4. On November 24, 1982, complainant shipped the tomatoes from Chula Vista, to respondent in Mercedes, Texas. The tomatoes arrived at respondent's place of business in Mercedes, Texas on November 26, 1982, and were accepted by respondent.

5. On December 3, 1982, at 2:45 p.m., a federal inspection was made covering tomatoes in respondent's warehouse. Such inspection showed in relevant part as follows:

WHERE INSPECTED: Applicant's warehouse. Mercedes, Texas.

Products Inspected: TOMATOES in two layer lugs printed or stamped, "Don Diego Brand Tomatoes. Distributor: Otay Packing Co., Chula Vista, Ca. 92001. Net Wt. 18 Lbs. Produce of Mexico Lg-Ex Lg 56 A.60 Count". Applicant states 1848 lugs Mexico stock.

Condition of Load: Stacked on pallets in applicant's cooler.

Condition of Pack: Fairly tight. Paper dividers between layers.

Temperature of Product: Temperature taken from various locations range from 45 to 50° F.

Condition: Approximately 5% green and breakers, 15% turning and pink, 60% light red and red. In most samples from 2 to

10%, in some none, average 4%, including 1% serious damage by sunken discolored areas generally affecting shoulders. Average 3% soft. Decay ranges from 13 to 28%, average 19%. Decay is mostly Gray Mold Rot/ an (sic) or *Alternaria* Rot, some Bacterial Soft Rot, (sic) Each rot in all stages, mostly in advanced stage.

6. Respondent has not paid complainant any part of the \$9,240 purchase price of the tomatoes.

7. The formal complaint was filed on May 12, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent's defense to complainant's action herein is the allegation that complainant breached the contract of sale by shipping tomatoes that were not of merchantable quality. The regulations (7 CFR § 46.43(i) & (j)) provide that in an f.o.b. sale there is a warranty that the produce sold "is to be placed free on board . . . at shipping point, in suitable shipping condition". In addition the regulations define suitable shipping condition, in relevant part, as "a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The common law warranty of merchantability is applicable only at shipping point and the suitable shipping condition warranty provided in the regulations is an extension of such warranty. *North America v. Eddie Anakelian*, 41 Agric. Dec. 759 (1982). Since respondent accepted the tomatoes, it had the burden of proving by a preponderance of the evidence that complainant breached the warranty of suitable shipping condition relative to such tomatoes. *The Grower-Shipper Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969). On numerous occasions we have held destination inspections to be too remote in time from time of delivery to be of value in determining the issue of whether produce made good delivery under the suitable shipping condition warranty. See *Oneonta Trading Corporation v. Tommie's Cello-Pak, Inc.*, 40 Agric. Dec. 1798 (1981); *Heitzman Produce v. Palella*, 26 Agric. Dec. 921 (1967); *Pan-American Fruit Company v. Hallen Hazzouri*, 25 Agric. Dec. 681 (1966); *Peter Condukes Co. v. Michael Bros.*, 19 Agric. Dec. 650 (1960) and *S. E. Lankford & Sons v. Nach*, 19 Agric. Dec. 1316 (1960); *Inness Bros. v. Fruit Supply Co.*, 17 Agric. Dec. 580 (1958). In this case, the federal inspection some seven days after the arrival of a highly perishable product such as tomatoes is too remote to be of any value in proving the condition of the tomatoes at time of

arrival. Accordingly, we find that respondent has failed to meet its burden of proving a breach of contract on the part of complainant.

Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof, or \$9,240. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim, since it is based on an allegation of breach of contract as to the subject tomatoes, should be dismissed.

ORDER

Within thirty (30) days from the date of this order, respondent shall pay to complainant, as reparation, \$9,240, with interest thereon at the rate of 13 per cent per annum from December 1, 1982, until paid.

The counterclaim is dismissed.

GROWERS MARKETING SERVICES INC. v. DONALD L. HEYL d/b/a DON HEYL, PACA Docket No. 2-6265. Decided March 12, 1984.

Complainant, *pro se*.

Thomas J. Johnson, Esquire, Sioux Falls, South Dakota for respondent.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of \$2,470.56, in connection with a transaction in interstate and foreign commerce involving watermelons, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed a response thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further evidence by way

of verified statements. Complainant filed an opening statement, respondent an answering statement, and complainant a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Growers Marketing Service, Inc., is a corporation whose mailing address is P.O. Box 2595, Lakeland, Florida 33806.

2. Respondent, Donald L. Heyl, is an individual doing business as Don Heyl whose mailing address is Box 206, Akron, Iowa 51001. At all material times, respondent was licensed under the Act.

3. On or about May 11, 1982, respondent contacted Mr. A. B. Larson, a partner in L & L Brokerage Co., 1072 Howard Street, Omaha, Nebraska 68102, and asked him to arrange for the shipment of one truckload of watermelons to respondent's customer in Saskatoon, Saskatchewan, Canada. In furtherance thereof, Mr. Larson contacted complainant through its employee, Mr. Peter Tanner, who agreed to enter into such a transaction. The transaction called for complainant to sell to respondent one truckload of watermelons to be delivered, at a delivered price of \$13.50 per cwt., to respondent's customer in Saskatoon.

4. Subsequent to the agreement, complainant notified Mr. Larson that it could not arrange for transportation of the load of watermelons to Canada due to a lack of "Canada-eligible trucks." After Mr. Larson relayed this information to respondent, respondent agreed that, if no such truck could be located in Florida, as a last resort, complainant could ship the watermelon to Akron, Iowa, for transshipment to Canada at respondent's expense.

5. On or about May 11, 1982, complaint shipped one truckload of grey watermelons to respondent, in Akron, Iowa, which consisted of 562 Cartons, weighing 42,140 pounds. On arrival in Iowa, on or about Friday May 14, 1982, five cartons, weighing 375 pounds, having a value of \$50.63, were found to be broken and were rejected. The remaining 557 cartons were transshipped to respondent's customer in Canada. They arrived on May 16, 1982. On Monday, May 17, 1982, respondent reported a problem with the load to the broker, which conveyed the information to complainant.

6. On or about May 18, 1982, at 2:00 p.m., the load of watermelons was the subject of a Canadian inspection at respondent's customer's warehouse which reflected that an average of 30% (range nil to 80%) of the watermelons showed decay. The temperature of the watermelons was, about, 43°F. The cooler temperature was 39°F., and the outside temperature was 59°F.

7. Respondent paid complainant \$3,218.34. It claimed damages of \$2,470.56, which it computed as follows: \$2,185.50 adjustment, \$275 for repacking, and \$10 as the cost of inspection. Respondent claims that these amounts are the amounts which its customer claimed as losses and deducted from its payment to respondent.

8. The formal complaint was filed on January 24, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is no dispute that the respondent accepted the watermelons. Having accepted them it is liable for the purchase price less any payments made and less any damages shown to have been caused by a breach of the parties' contract by complainant. The respondent has the burden of proving, by a preponderance of the evidence, that complainant breached the contract, and the damages resulting therefrom. *Sunny Ridge Farms v. Edward Dilatush & Co.*, 30 Agric. Dec. 961 (1971).

Respondent alleges that complainant breached their contract, and cites the Canadian inspection which showed 30% decay as proof thereof. Complainant claims that it had only agreed to ship the watermelons to Iowa, and that it did not even know that they were to be transshipped to Canada. Under its theory, since respondent accepted the load on delivery in Iowa, complainant assumed the risk of the loss when the watermelons were shipped to Canada. Complainant's view of the case is not supported by any evidence other than its statements. All of the other evidence, including the broker's sworn statement and unsworn statements, as well as the statements of respondent's other suppliers, and respondent's statements support respondent's position, i.e., complainant knew that the watermelons were to be shipped to Canada and assumed the risk of loss until delivery in Canada. The record is clear, complainant's statements notwithstanding, that it knew the shipment was to be delivered to respondent's customer in Canada and that it assumed the risk of loss until that point. In any event, we are not sure that the May 18, 1982, Canadian inspection which showed 30% decay would not establish that complainant breached the contract even if we held that the respondent assumed the risk of loss after delivery in Iowa. See, *Salinas Lettuce v. Salt City Produce*, 30 Agric. Dec. 1098 (1971).

However, who assumed the risk of loss, and when, is not an issue we must decide because, even if we ruled in respondent's favor, respondent has failed to prove any damages except for the 5 crates, valued at \$50.63, which complainant admits were received damaged in Iowa. The only evidence which respondent submitted on the

issue of damages was its assertion that its customer deducted \$2,470.56 from its payment to respondent. However, such an assertion even in a sworn statement is not sufficient for respondent to carry its burden of proving damages by a preponderance of the evidence. *Leo Young, Inc. v. J. Schlanger & Sons*, 16 Agric. Dec. 716 (1957). Respondent needed to adduce further evidence, such as an accounting, to carry its burden of proof. Since the measure of damages here would be the value of the watermelon actually delivered as compared to the value the watermelon would have had if as warranted, without such information, respondent's damages cannot be computed. *Carol-Ann Produce v. C & J Farms*, 32 Agric. Dec. 1869 (1973). Moreover, without such proof, we cannot determine, irrespective of the amount deducted by respondent's customer, whether respondent actually suffered a loss. *D. L. Piazza Co. v. Sarnoff & Son*, 8 Agric. Dec. 818 (1949). For example, if the \$2,470.56 claimed as damages merely represented a loss of profit, respondent would not be entitled to claim such an amount as damages unless it had shown that such profits were specifically within the parties' contemplation at the time the contract was negotiated. *Ben Gatz Co. v. Albertson Co.*, 28 Agric. Dec. 1192 (1969).

In view of the above, on the basis of all of the evidence in the record, we hold that respondent is obligated to complainant in the amount of \$2,419.93, or the contract price (\$5,688.90), less payments made (\$3,218.34), and less damages proven (\$50.63). Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty (30) days from the date of this order, respondent shall pay complainant \$2,419.93, as reparation, plus interest at the rate of 13 percent per annum from June 1, 1982, until paid.

GENBROKER CORPORATION a/t/a GENERAL BROKERAGE COMPANY v.
HAVANA POTATOES CORP. PACA Docket No. 2-6268. Decided
March 12, 1984.

Complainant, *pro se*.

Arthur Slovin, Esquire, New York, New York, for respondent.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,875 in connection with a transaction in interstate and foreign commerce involving garlic, a perishable agricultural commodity.

A copy of the Department's report of investigation was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint. Since it failed to file a timely answer, a default order was issued on February 2, 1983. However, respondent's motion to reopen after default was granted on May 5, 1983, and its answer was ordered filed. In its answer, respondent denied any further liability to complainant in connection with the subject transaction.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements. Complainant filed an opening statement, respondent an answering statement, and complainant a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Genbroker Corporation, is a corporation doing business as General Brokerage Co., whose mailing address is 608 E. 9th Street, Los Angeles, California 90015.

2. Respondent, Havana Potatoes Corp. is a corporation whose mailing address is 1 River Road, Edgewater, New Jersey 07020. At all material times, respondent was licensed under the Act.

3. On or about May 20, 1982, in the course of interstate and foreign commerce, respondent purchased one truckload of garlic, grown in Mexico, from complainant which consisted of 1343 cartons

plainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty (30) days from the date of this order, respondent shall pay complainant \$2,875 as reparation plus interest at the rate of 13 percent per annum from July 1, 1982, until paid.

GAB PRODUCE DISTRIBUTORS INC. v. LAS VILLAS PRODUCE COMPANY
INC. PACA Docket No. 2-6270. Decided March 12, 1984.

Respondent accepted load in the FOB Sale, and therefore became liable for the contract price. Respondent failed to prove breach of warranty by complainant, or that the order had been changed to a consignment.

Complainant, *pro se*,
Yolanda Hares Hader, Esquire, Chicago Illinois for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,542.50 in connection with the sale of a quantity of peppers and watermelons shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability. Respondent also filed a counterclaim for an unspecified amount in connection with the subject matter of the complaint. Complainant did not file a reply to this counterclaim.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given the opportunity to file additional evidence in the form of verified statements and briefs. Respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, G.A.B. Produce Distributors, Inc., is a corporation whose address is 1st Terminal No. 1, Nogales, Arizona. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent, Las Villas Produce Co., Inc., is a corporation whose address is 83 South Water Market, Chicago, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about March 2, 1982, complainant sold to respondent one truckload of Jalapeno peppers and watermelons consisting of 84 crates of peppers at \$1,848 and four bins of watermelons at \$652.50, plus precooling and palletizing for the peppers at \$42, for a total of \$2,542.50 f.o.b. A 45°F. temperature was to be maintained on board the truck throughout the period of transit. Prior to loading, on February 28, 1982, the watermelons were subjected to a federal-state inspection which found them to contain defects of 20%, including 10% scars and 7% overripe, with no decay.

4. Complainant shipped the produce from Nogales, Arizona, in interstate commerce to respondent, where it arrived on March 8, 1982, and was unloaded from the truck and accepted by respondent. Respondent wrote on the trucker's receipt and manifest that the produce was received under protest subject to a federal inspection, and was going to be handled on consignment.

5. Upon arrival of the truck, respondent sent a telegram to complainant, dated March 9, 1982, which indicated that the truck had arrived late and that respondent was going to obtain a federal inspection.

6. After sending the March 9, 1982, telegram, respondent secured a federal inspection upon the produce situated at its warehouse, at 10:50 a.m. on March 9, 1982, which found as follows, in relevant part:

* * * * *

Temperature of Product: Each lot: In various locations 43° to 50°F.

Condition: Pepper lot: Mostly fresh, firm and good green color. Turning red ranges from 5 to 10%, average 6%. Shriveling ranges from 5 to 20%, average 12%. Decay ranges from 7 to 20%, average 16%. Bacterial Soft Rot in early stages. Watermelon lot: Generally firm. Damage by bruising scattered throughout bins ranges from 2 to 4 watermelons per sample

average 11%. Overripe average 1%. Decay in 1/2 of samples 1 to 3 watermelons, in remainder none, average 4%, Blossom End Rot in early stages.

7. On March 9, 1982, after the inspection, respondent's president, Carmelo Caldero, spoke by telephone to complainant's president, Guadalupe A. Benavides, concerning the produce. Benavides never authorized Caldero to handle the load on consignment for complainant's account.

8. Respondent sent a letter to complainant dated April 23, 1982, in which it stated as follows, in pertinent part: "In accordance with our telephone conversation of April 23, 1982, I am sending the disclosure of your #1021 dated March 2, 1982. As you know, this product was inspected and most of it was called "damaged". We sold part of it as follows:" Respondent then indicated that it had sold 2,760 lbs. of the 5,520 lbs. of watermelons shipped for \$358.80, from which it had deducted \$82.80 commission, for net proceeds of \$276. Respondent also stated that it had sold four crates of peppers for \$64, less \$9.60 commission, for net proceeds of \$54.40, totalling \$330.40 for the entire load. Respondent included with this letter a check for \$330.40, which was immediately returned by complainant.

9. Respondent has, to date, failed to pay complainant \$2,542.50 of the contract price, which complainant claims to be due and owing.

10. An informal complaint was filed on November 8, 1982, which was within nine months from the time the cause of action herein accrued. Complainant filed a formal complaint on January 3, 1983. Respondent filed a counterclaim on April 1, 1983, in connection with the transaction involved in the complaint.

CONCLUSIONS

In this f.o.b. sale of peppers and watermelons, respondent, the buyer, claims that the produce was in poor condition upon arrival at its place of business, and that it and complainant agreed to change the contract terms to a consignment, with respondent handling the produce for complainant's account. Complainant denies responsibility for the condition of the produce because of the late arrival of the truck, and also denies that it agreed to a consignment.

We will first determine whether the parties agreed to change the original f.o.b. terms to a consignment. Respondent, as the party asserting the change, has the burden of proving it by a preponderance of the evidence. *Howard Farms, Inc. v. Orval Kent Food Co., Inc.*, 41 Agric. Dec. 545 (1982). The only evidence in the record that supports respondent's position is an affidavit of its president, Car-

melo Caldero, submitted as its answering statement. Caldoro claimed that on March 9, 1982, after receiving the results of the federal inspection taken on the produce that day at respondent's place of business, he called complainant's president, Guadalupe A. Benavides, and advised him of these results. Caldero stated that Benavides asked him to accept the shipment on consignment and salvage whatever was possible. Benavides also submitted an affidavit in which he denied that complaint ever gave authorization for respondent to handle the produce on consignment. These affidavits are of equal weight. There is no other evidence in the record that supports respondent's claim of consignment. Although respondent wrote on the trucker's receipt and manifest that it was handling the produce on consignment, respondent admitted in its answering statement that these notations were made before discussion was had with respondent concerning the disposition of the load. Respondent sent a March 9, 1982, telegram to complainant which states that a federal inspection had been requested, but does not mention any intent by respondent to handle the load on consignment. In addition, respondent's April 23, 1982, letter to complainant, in which respondent accounts for the alleged resales, does not refer to any earlier agreement whereby respondent was authorized to resell the produce on consignment. It is likely that some reference to such agreement would have been made in that April 23, 1982, letter if it had actually occurred. It is, therefore, clear that respondent has failed to sustain its burden of proving that the original f.o.b. contract was changed to a consignment.

Respondent contends that it rejected the load. However, notice of rejection must be clear and unmistakable (*Mario Saikhon v. Russell-Ward Company*, 34 Agric. Dec. 1940 (1975)), and the record does not show that respondent ever notified complainant that it was rejecting the load. Further, the March 9, 1982, inspection reveals that the produce had been unloaded prior to inspection, which action constitutes acceptance. *Mario Saikhon v. Russell-Ward Company*, *supra*.

Having accepted the load in this f.o.b. sale, respondent became liable for the contract price, less damage due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Tony Misita & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). Respondent claims that the February 28, 1982, shipping point inspection in Nogales, Arizona, shows that the watermelons were in breach of warranty. However, despite the 20% defects revealed, the watermelons were in merchantable condition under the

no-grade contract present here.¹ Respondent also claims that the condition of the produce upon arrival at its place of business, as revealed by the March 9, 1982, federal inspection, signifies a breach of warranty. In f.o.b. contracts, the seller gives a warranty of suitable shipping condition, which is defined in the regulations (7 CFR 46.43(j)) as meaning "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The inspection results do not show abnormal deterioration in the watermelons but do indicate that the peppers were severely damaged. However, there is merit to complainant's contention that transportation conditions were abnormal, as the produce, which left Nogales, Arizona on March 2, 1982, should have arrived in Chicago, Illinois no later than March 5, 1982, but instead was not delivered until March 8, 1982, and inspected on March 9, 1982. Respondent argues that this delayed arrival had no effect on the condition of the load, as the inspection shows a product temperature of from 43° to 50°F., which indicates that the transit temperature did not significantly vary from the 45°F. temperature required to be maintained. However, there is no evidence in the record that the temperature did not undergo a wide variance during the time the load was being transported. Even if the temperature during transit had been maintained at a constant 43° to 50°F., we are convinced that the long delay experienced by the truck could have had a significant, negative effect on the condition of the peppers. We thus conclude that the abnormal transportation conditions present here obviated the suitable shipping condition warranty. Therefore, respondent has failed to sustain its burden of proving a breach of warranty.

As there was no warranty in effect, and we have concluded that the contract terms were not changed to a consignment, respondent is liable for the entire contract price of \$2,542.50. Respondent's failure to pay this amount is a violation of section 2 of the Act, for which reparation should be awarded, with interest. Respondent's counterclaim is based on complainant's alleged breach of warranty and must, therefore, be dismissed.

¹ It can readily be assumed that the watermelons were also merchantable on the date of shipment, March 2, 1982, as the March 9, 1982, inspection at respondent's place of business shows that they were in merchantable condition at the time, as they were not in breach of complainant's warranty of suitable shipping condition, had such warranty been in effect. See *infra*.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$2,542.50, with interest thereon at the rate of 13% per annum from April 1, 1982, until paid.

JONES AND CHURCH FARMS *v.* BETTY'S WHOLESALE PRODUCE. PACA
Docket No. 2-6312. Decided March 22, 1984.

Respondents claim that no contract price was ever determined, and that due to the condition of the produce upon delivery was unable to resale at a profit and suffered some damages. There was no evidence accepted to prove any of these allegations and respondent is found liable for the full contract price.

Complainant, *pro se*.

Robert Fowler, Esquire, Fort Myers, Florida, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against the respondent in the amount of \$3,526.40 in connection with the sale of two truckloads of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability to complainant.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Jones and Church Farms, is a partnership whose address is P.O. Box 98, Unicoi, Tennessee.
2. Respondent, Betty's Wholesale Produce, is an individual, Betty J. Bryant, whose address is Route 1, Box 510, Fort Myers, Florida.

At the times of the transactions involved herein, respondent was licensed under the Act.

3. On July 27, 1982, complainant sold to respondent 420 cartons of tomatoes at a price, including pallets, of \$1,352 f.o.b. The tomatoes were shipped on July 27, 1982, in interstate commerce to respondent and arrived on Saturday, July 31, 1982. Upon arrival, the tomatoes were unloaded and accepted by respondent. On the following Monday, August 2, 1982, respondent spoke to complainant's representative, Carl Danford, and complained about the condition of the tomatoes but did not formally reject the load. To date, respondent has not paid complainant any part of the purchase price for the tomatoes.

4. On August 5, 1982, complainant sold to respondent 576 cartons of tomatoes at a price, including pallets, of \$2,174.40 f.o.b. The tomatoes were shipped on August 5, 1982 in interstate commerce to respondent, who accepted them upon arrival. Respondent did not inform complainant that she desired to reject the load. To date, respondent has not paid complainant any part of the purchase price for these tomatoes.

5. A formal complaint was filed on February 16, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In her answer, respondent admits purchasing two loads of tomatoes from complainant, one on July 27, 1982, and the other on August 5, 1982, but denies complainant's assertions that a firm price was agreed upon. Respondent also contends that when the tomatoes arrived they were in such a deteriorated condition that she could not obtain any net proceeds from their resale.

The first issue is whether the parties agreed to a firm price for the tomatoes at their time of sale. Although respondent, in her answer, asserts that no price was agreed to, she admits in her answering statement that when the tomatoes were purchased, complainant's representative "told her what he thought the price of the tomatoes would be." Respondent also admits in her answering statement that, after the tomatoes were delivered, she spoke to another of complainant's representatives and "requested an adjustment on the price of the tomatoes. . . ." These admissions clearly establish the truth of complainant's claim that a specific price was agreed to in the amount of \$1,352 f.o.b. for the July 27, 1982, load and \$2,174.40 f.o.b. for the August 5, 1982 load.

Although respondent denies accepting the two loads of tomatoes, she does not allege ever having communicated to complainant, in a clear, unmistakable fashion, an intent to reject them. Respondent

thus is considered to have accepted the tomatoes. See *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975).

Having accepted the two loads, respondent became liable for their contract price, less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). As these were f.o.b. sales, complainant gave an implied warranty of suitable shipping conditions, which is defined in the Regulations (7 CFR 46.43(j)) as meaning "the commodity, at the time of billing, is in a condition which, if handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

With respect to the July 27, 1982, load, we need not determine whether complainant breached its warranty, as the record shows that the warranty was not applicable because of abnormal transportation conditions. Respondent asserts that the truck arrived at its place of business on late Saturday, July 31, 1982. The four days required for transit is twice as long as the normal transportation time from Unicoi, Tennessee, complainant's location, to respondent's warehouse in Fort Myers, Florida. This is evidence of abnormal transportation conditions, which renders the suitable shipping condition warranty inapplicable.

There is no evidence of abnormal transportation conditions regarding the August 5, 1982, load, and we must, therefore, determine whether complainant was in breach of warranty. Respondent never obtained a federal inspection on this load but has submitted eight sworn statements from persons who allegedly observed the poor condition of the tomatoes upon arrival. These statements are deserving of little evidentiary weight for several reasons. Two statements are from persons who are employed by respondent and obviously biased in her favor. Three refer only to tomatoes observed during late July and the first of August; several days before the August 5, 1982, load was even sold to respondent. Further, many of the statements contain only a general description of the condition of the tomatoes and do not indicate the degree of damage. In addition, most of them fail to identify the tomatoes described as being those purchased from complainant. Respondent has also filed several photographs purportedly showing the two loads of tomatoes in a severely deteriorated condition. These photographs are totally without evidentiary value as respondent has not established that the tomatoes pictured are those that were contained in the two loads at issue here, or that the photographs were taken upon the

arrival of the tomatoes at respondent's warehouse so as to reflect the condition of the tomatoes at that time. Therefore, we must conclude that respondent has failed to sustain its burden of proving a breach of warranty.

Even if, for the sake of argument, we were to consider the suitable shipping condition warranty to have been breached by complainant, we would find that respondent has failed to meet its burden of proving damages. Respondent is required to show that its resales were prompt and proper. *Green Valley Produce Co-op v. Nicholas J. Zerillo, Inc.*, 41 Agric. Dec. 519 (1982). Respondent claims in her answer that 404 cartons were sold at \$3.00 per box, and 19 had to be replaced after sale. However, respondent has not provided the dates of sale, and it is thus impossible for us to conclude that these resales were promptly made.

Since respondent purchased, received and accepted two loads of tomatoes from complainant and has failed to prove any breach of warranty by complainant, or any damages incurred even if there had been a breach, respondent is liable for the entire contract price of \$3,526.40. Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,526.40, with interest thereon at the rate of 13% per annum from September 1, 1982, until paid.

GENERAL PARTNERS, MITCH RESETAR JR., LOUIS RESETAR JR., and ANTHONY RESETAR JR., and LIMITEO PARTNERS d/b/a WEST COAST FARMS INC. v. SA-SO POULTRY SALES CO., INC. a/t/a VALENTINE FOODS. PACA Docket No. 2-6281. Decided March 23, 1984.

Respondent claims that the complainant made an adjustment to the contract price after an inspection of the shipment was made. There was no evidence submitted to substantiate this. Respondent was unable to prove any breach of warranty by complainant, and is found liable for full contract price.

Thomas Oliveri, for complainant.

Robert S. Bauer, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$892.08 in connection with the sale of a quantity of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, General Partners, Mitch Resetar, Jr., Louis Resetar, Jr., and Anthony L. Resetar and Limited Partners d/b/a West Coast Farms, is a partnership whose address is P.O. Box 800, Watsonville, California.

2. Respondent, Sa-So Poultry Sales Co., Inc. a/t/a Valentine Foods, is a corporation whose address is 609 North American Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On March 21, 1982, complainant sold to respondent 756 cartons of lettuce at a price of \$3.00 per carton plus \$491.40 cooling and \$22.50 for a temperature recorder totalling \$2,781.90 f.o.b. The Adolph B. Cimino Company, Salinas, California, acted as the broker.

4. On March 21, 1982, complainant shipped the lettuce in interstate commerce to respondent in Philadelphia, where it arrived and was accepted. After arrival, the broker called respondent in response to a request by complainant, who said he had heard that the lettuce was being sold in Philadelphia for a low price. Respondent told the broker that the market was depressed and it was not

selling the lettuce purchased from complainant at the price it expected. The broker related this to complainant, who told the broker that it expected to be paid the full contract price. The broker conveyed this information to respondent. No agreement was ever entered into between the parties to alter the contract price.

5. Respondent has, to date, paid complainant \$1,889.82 for the lettuce at issue, which amount was accepted by complainant as partial payment.

6. An informal complaint was filed on October 14, 1982, which was within nine months from the time the cause of action herein accrued. A formal complaint was subsequently filed on March 21, 1983.

CONCLUSIONS

Respondent claims that when it received the 756 cartons of lettuce, an inspection was made, and because of the results of the inspection, complainant agreed to lower the contract price. This is denied by complainant.

Respondent, as the party alleging a change in the contract price, has the burden of proving it by a preponderance of the evidence. *Howard Farms Inc. v. Orval Kent Food Co., Inc.*, 41 Agric. Dec. 545 (1982). The most convincing evidence of whether the contract price was changed is the statement of the broker, made in a November 21, 1982, letter to the Department, as the broker is considered to be free from bias. The broker states that complainant requested it to contact respondent because complainant had heard that its lettuce was selling for a low price on that Philadelphia market. The broker then called respondent, who then said that the market was depressed. The broker related this to complainant, who advised that it expected payment in full. The broker conveyed this information to respondent. The broker's statement does not contain any reference whatsoever to an agreement between the parties to lower the contract price. Based on the broker's version of events, we conclude that respondent has failed to sustain its burden of proving a change in the contract price.

As respondent admits receiving and accepting the lettuce, it is liable for the contract price less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Tony Misita and Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1982). Respondent claims that the lettuce was inspected upon arrival, with the results of the inspection providing justification for a reduction in the sales price. Respondent has filed what appears to be an inspection report, but such report is not legible. There is no

other evidence in the record concerning the condition of the lettuce upon arrival. Therefore, we conclude that respondent has failed to prove the existence of any breach of warranty by complainant, and is thus liable for the contract price of \$2,781.90.

Respondent has paid complainant \$1,889.82, and its failure to pay the remaining \$892.08 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$892.08, with interest thereon at the rate of 13% per annum from May 1, 1982, until paid.

MILLS DISTRIBUTING COMPANY *v.* SA-SO POULTRY CO. INC. *n/t/o*
VALENTINE FOODS. PACA Docket No. 2-6283. Decided March
28, 1984.

Respondent alleges that it never purchased three loads of produce that it was billed for by the complainant, but the complainant's evidence outweighed that submitted by the respondent, and it is found liable for the contract price.

Thomas Oliveri, for complainant.

Robert G. Bauer, Esquire, for respondent.

Andrew Y. Stanton, Presiding Officer

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$13,462.80 in connection with the sale of five truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for two of the truckloads in the amount of \$2,874.60 but denying liability for the remainder.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evi-

dence in the form of verified statements as well as briefs. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, General Partners, Mills Distributing Company, is a corporation whose address is P.O. Box 642, Salinas, California.

2. Respondent, Sa-So Poultry Co., Inc. a/t/a Valentine Foods, is a corporation whose address is 609 North American Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On September 1, September 14, October 4, October 11, and October 12, 1982, complainant sold to respondent a total of five truckloads of lettuce, one on each date. The prices, including a charge for a temperature recorder, were as follows: \$657 for the September 1, 1982, load; \$2,860 for the September 14, 1982, load; \$3,240 for the October 4, 1982, load; \$3,675.70 for the October 11, 1982, load; and \$3,673.70 for the October 12, 1982, load. The sales were made on an f.o.b. basis with the Adolph B. Cimino Company, Salinas, California, acting as the broker.

4. On September 1 and September 14, 1982, complainant shipped the lettuce that had been sold to respondent on those dates in interstate commerce to respondent, which accepted it.

5. To date, respondent has paid complainant \$657 for the load of lettuce sold on September 1, 1982, but has failed to make any payment for the load sold on September 14, 1982.

6. On October 4, 1982, complainant loaded the lettuce sold to respondent on that date on board a Triple H truck for shipment to respondent. On October 11, 1982, complainant loaded the lettuce sold to respondent on that date on board a COOP 501162 truck for shipment to respondent. On October 12, 1982, complainant loaded the lettuce sold to respondent on that date on board a COOP 01292 truck for shipment to respondent.

7. To date, respondent has failed to make any payment for the loads sold on October 4, October 11, and October 12, 1982.

8. On October 7, October 14, and October 15, 1982, complainant sent respondent invoices representing, respectively, the loads sold on October 4, October 11, and October 12, 1982. The invoices showed respondent as the buyer, identified the produce sold, contained price terms, showed the date shipped and the date invoiced, identified the carrier, stated that f.o.b. terms were in effect, and contained the name of the broker. Respondent never objected to these invoices.

9. An informal complaint was filed on March 17, 1983, which was within nine months from when the causes of action herein accrued.

10. On May 3, 1983, respondent filed an answer in which it admitted liability for the loads shipped on September 1 and September 14, 1982, in the amount of \$2,874.60. An Order Requiring Payment of Undisputed Amount was issued on July 15, 1983, requiring respondent to pay reparation to complainant in the amount of \$2,874.60.

CONCLUSIONS

Respondent has admitted liability for the lettuce sold on September 1 and September 14, 1982, and an Order Requiring Payment of Undisputed Amount has been issued on July 15, 1983, ordering respondent to pay reparation to complainant in the amount of \$2,874.60, the amount alleged by complainant to be due and owing in connection with these two loads. Therefore, the only transactions remaining in issue are complainant's alleged sales made on October 4, October 11, and October 12, 1982, on an f.o.b. basis for a total of \$10,587.40. Respondent denies purchasing these three loads and also denies ever receiving or accepting them.

We must first determine whether respondent purchased these three loads of lettuce. Complainant, as the party alleging that these three sales were made, has the burden of proving its allegations by a preponderance of the evidence. *Richardo Castaneda d/b/a/ Peninsula Vegetable Exchange v. VALLEY BROKERAGE, INC.*, 40 Agric. Dec. 797 (1981). Complainant has filed a sworn opening statement in which its salesman, Ed Little, states that he sold these loads to respondent. Respondent, in a sworn answering statement, denies making such purchases and refers to its accounts payable ledger, which reflects only the two purchases made from complainant in September 1982. Complainant has placed into evidence its invoices for the three sales allegedly made in October 1982. These invoices clearly reflect the contract terms asserted by complainant (see Finding of Fact 8). Respondent, in its answer, states on three occasions that it did not purchase these three loads, for which it was "invoiced." In view of respondent's admission that it was invoiced for these three transactions, its failure to provide any evidence that it objected to the invoices is evidence of the truth of the contract terms which they contain. *Casey Woodyck, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972). On the basis of all the evidence in the record, we conclude that complainant has sustained its burden of proving that these three sales were made to respondent.

Respondent contends that the three loads of lettuce at issue were never received by it. In f.o.b. sales such as these, complainant has the burden of showing that the produce was properly loaded on

board the trucks at shipping point. Thereafter, respondent is considered to be in possession of the loads and bears the risk of loss. *Veg-A-Mix v. Pulillo Fruit Company*, 40 Agric. Dec. 1340 (1981). Complainant's invoices, received without objection by respondent, specifically identify the trucks on which the lettuce was loaded and state the dates of shipment. Therefore, we conclude that the lettuce was properly loaded. Respondent is, therefore, liable for the contract prices for these three loads totalling \$10,587.40, and its failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$10,587.40, with interest thereon at the rate of 13 per cent per annum from November 1, 1982, until paid.

HOMESTEAD TOMATO PACKING CO. INC. v. TOMATOES INC. PACA
Docket No. RD-84-88. Decided March 30, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT AND REQUIRING PAYMENT OF UNDISPUTED AMOUNT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer and a Default Order was issued on February 1, 1984. Subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR § 47.25(e)). The motion was served on complainant, which filed an opposition thereto.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

In its complaint, complainant seeks to recover \$40,984.80, which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondent during the period March through April, 1983. In respondent's answer to the complaint, which we

above ordered to be filed, it admitted that \$34,936.80 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above-quoted section, respondent shall pay to complainant, as an undisputed amount, \$34,936.80. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from May 1, 1983, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. § 409b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the disputed amount has been issued.

PEMBERTON PRODUCE INC. v. SA-SO POULTRY SALES CO. INC. a/t/a
VALENTINE FOODS. PACA Docket No. 2-6282. Decided April 3,
1984.

Thomas Oliveri, for complainant.

Robert G. Bauer, Esquire, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of \$13,964.25, later amended to \$10,074.25, in connection with four loads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto

admitting liability for \$1,960.40 but denying liability for the remainder.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Pemberton Produce, Inc., is a corporation whose address is P.O. Box 5361, Salinas, California.

2. Respondent, Sa-So Poultry Sales Co., Inc. a/t/a Valentine Foods, is a corporation whose address is 609 North American Street, Philadelphia, Pennsylvania. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On September 15, 1982, complainant sold to respondent 850 cartons of lettuce at \$5.00 per carton plus \$.65 per carton cooling and \$22.50 for a temperature recorder, totaling \$4,825 f.o.b. The Adolph B. Cimino Co., Salinas, California, acted as the broker. The lettuce was shipped in interstate commerce to respondent, which accepted it. A federal inspection was taken upon arrival, which revealed deterioration, and as a result, the parties agreed to a reduction in the contract price to \$4.25 per carton, for a total of \$4,187.50. The broker issued a confirmation on September 23, 1982, reflecting this price adjustment.

4. On September 21, 1982, complainant sold to respondent 845 cartons of lettuce at \$3.50 per carton plus \$.65 per carton cooling and \$22.50 for a temperature recorder, totaling \$3,529.25 f.o.b. The Adolph B. Cimino Co. acted as the broker. The lettuce was shipped in interstate commerce to respondent, which accepted it. A federal inspection was taken upon arrival which revealed deterioration, and as a result, the parties agreed to change the contract terms to a consignment, with respondent retaining a 10% commission. The broker issued a confirmation on September 28, 1982, reflecting this alteration of the contract terms. Respondent never provided an account of sales. Complainant eventually sent respondent an invoice for \$1.67 per carton plus \$.65 per carton cooling and \$22.50 for a temperature recorder, totaling \$1,982.90.

5. On October 4, 1982, complainant sold to respondent 135 cartons of lettuce at \$5.00 per carton plus \$.65 per carton cooling, totaling \$2,457.75 f.o.b. The Adolph B. Cimino Co. acted as the broker. On October 5, 1982, the broker issued a confirmation of sale

which reflected these terms of sale. The confirmation also noted that the lettuce was loaded on a truck, Triple HH&B P.O. 1087, and departed at 16:15 p.m. on October 4, 1982.

6. On October 11, 1982, complainant sold to respondent 864 cartons of lettuce at \$5.50 per carton plus \$.65 per carton cooling and \$22.50 for temperature recorder, totaling \$5,336.20 f.o.b. The Adolph B. Cimino Co. acted as the broker. On October 13, 1982, the broker issued a confirmation of sale which reflected these terms of sale. The confirmation also noted that the lettuce was loaded on a truck, CO-OP 501092 P.O. 1094, and departed at 6:20 p.m. on October 11, 1982.

7. On October 28, 1982, respondent issued a check to complainant for \$3,890 and sent it to complainant. The check did not contain any indication that it was being offered as payment in full. Complainant accepted the check as partial payment for the four loads of lettuce.

8. A formal complaint was filed on March 21, 1983, which was within nine months from when the causes of action herein accrued.

9. On May 3, 1983, respondent filed an answer in which it admitted liability for \$1,960.40 but denied liability for the remainder. An Order Requiring Payment of Undisputed Amount was issued on July 14, 1983, ordering respondent to pay reparation to complainant in the amount of \$1,960.40.

CONCLUSIONS

Respondent admits receiving and accepting from complainant two loads of lettuce purchased on September 15 and September 21, 1982, but claims that the lettuce was not in good condition upon arrival and, therefore, the parties agreed to reduce the price to \$3,890 and \$1,960.40, respectively. Complainant agrees that the contract prices were reduced, but claims that the reductions were to \$4,187.50 for the September 15, 1982, load and \$1,982.90 for the September 21, 1982, load. Respondent has paid complainant \$3,890 for the September 15, 1982, load with a check issued on October 28, 1982, which it claims constituted payment in full. Respondent denies purchasing or receiving the lettuce which complainant alleges it sold on October 4, 1982, and October 11, 1982. Respondent admitted in its answer that it owed \$1,960.40 and an Order Requiring Payment of Undisputed Amount was issued on July 14, 1983, ordering respondent to pay this amount to complainant.

With respect to the lettuce sold on September 15, 1982, the only amount in issue is the difference between the \$4,187.50 claimed by complainant and the \$3,890 paid by respondent, or \$297.50. The parties agree that the contract price was changed because of condi-

tion problems in the load, but disagree as to the price on which the parties settled. This dispute is resolved by examining the broker's September 23, 1982, confirmation (Finding of Fact 3), which supports complainant's position. The broker's version is deserving of great weight because of its position as an uninterested third party. Respondent's claim that its \$3,890 check issued on October 28, 1982, constituted payment in full, in effect asserting the existence of an accord and satisfaction, must be rejected, as the law is clear that no accord and satisfaction arises unless a payment is clearly designated as payment in full, and respondent's check was not so designated (Finding of Fact 7). *Branix Trucking v. Cumberland Produce Co., Inc.*, 41 Agric. Dec. 1814 (1982). Therefore, respondent is liable for \$297.50 for the September 15, 1982, load.

Regarding the September 21, 1982, load, there is only \$22.50 in dispute, the difference between the \$1,982.90 claimed by complainant and respondent's admission of liability for \$1,960.40. According to the broker's September 28, 1982, confirmation, the contract terms were changed to a consignment with respondent retaining a 10% commission. However, as respondent has not provided any account of sales, there is no evidence of the net proceeds of the consigned lettuce. Since there is only a \$22.50 difference between the claims of the parties, we will estimate the net proceeds of the consigned lettuce by splitting this difference. Therefore, respondent is liable for \$11.25 for the September 21, 1982, load.

Respondent's claim that it neither purchased nor received the two loads alleged by complainant have been sold to respondent on October 4 and October 11, 1982, are contradicted by the broker's confirmations of sale for these loads. The confirmations specifically identify the terms of the contracts as those alleged by complainant, the trucks on which the lettuce was loaded and the times and dates these trucks departed complainant's place of business (see Findings of Fact 5 and 6). In view of this evidence, which we have previously noted is deserving of a great weight because of the neutral position of the broker herein, we conclude that the lettuce was sold and shipped to respondent in accordance with complainant's allegations. Respondent's liability for the lettuce is not affected by whether or not the lettuce ever arrived at respondent's warehouse, as the two loads were sold on an f.o.b. basis, which shifts the risk of loss to respondent at the time the goods are properly loaded into the carrier, as the broker's confirmations reflect was done here. *Veg-A-Mix v. Pupillo Fruit Company*, 40 Agric. Dec. 1340 (1981). We thus conclude that respondent is liable for the contract price of \$2,457.75 for the October 4, 1982, load and \$5,336.10 for the October 11, 1982, load.

In summary, we have held respondent liable for \$297.50 for the September 15, 1982, load, \$11.25 for the September 21, 1982, load, \$2,457.75 for the October 4, 1982, load, and \$5,336.10 for the October 11, 1982, load, for a total of \$8,102.60. Respondent's failure to pay this amount to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$8,102.60, with interest thereon at the rate of 13% per annum from November 1, 1982, until paid.

ROYAL PACKING CO. v. SA-SO POULTRY SALES CO. INC. a/t/a VALENTINE FOODS. PACA Docket No. 2-6285. Decided April 3, 1985.

Failure to pay full price—Decision.

Respondent denies purchasing the shipment but is unable to provide substantial evidence to support his claim. Complainant submits invoice copies which were accepted by the Respondent, and that identify the trucks and dates of shipment, which is suitable evidence to prove that purchase was made by respondent, and produce shipped.

Thomas Oliveri, for complainant.

Robert G. Bauer, Esquire, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$29,869.75, in connection with the sale of six loads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for four of the loads in the amount of \$21,468.25 but denying liability for the two remaining loads.

Although the amount claimed as damages exceeds \$15,000, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an

opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Royal Packing Co., is a corporation whose address is P.O. Box 82157, Salinas, California.

2. Sa-So Poultry Sales Co., Inc. a/t/a Valentine Foods, is a corporation whose address is 609 North American Street, Philadelphia, Pennsylvania. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On September 15, September 17, September 22, and October 1, 1982, complainant sold to respondent a total of four loads of lettuce, one on each date. On October 11, 1982, complainant sold to respondent two loads of lettuce. The prices, including in most cases charges for cooling, a temperature recorder, and gates, were as follows: \$6,922.50 for the September 15, 1982, load; \$6,922.50 for the September 17, 1982, load; \$3,113.75 for the September 22, 1982, load; \$4,509.50 for the October 1, 1982, load; and \$5,608.50 and \$2,793 for the October 11, 1982, loads. The sales were made on an f.o.b. basis with the Adolph B. Cimino Company, Salinas, California, acting as the broker.

4. On September 15, September 17, September 22, and October 1, 1982, complainant shipped the lettuce that had been sold to respondent on those dates in interstate commerce to respondent, which accepted it.

5. On October 11, 1982, complainant loaded the two lots of lettuce sold to respondent on that date on board a COOP 501289 truck and a COOP 501162 truck, respectively, for shipment to respondent.

6. Complainant sent respondent invoices representing the loads sold on October 11, 1982. The invoices showed respondent as the buyer, identified the produce sold, contained price terms, showed the date shipped, identified the carrier, stated that f.o.b. terms were in effect, and contained the name of the broker. Respondent received these invoices and never objected to them.

7. To date, respondent has failed to make payment for any of the six loads of lettuce.

8. A formal complaint was filed on March 17, 1983, which was within nine months from when the causes of action herein accrued.

9. On May 3, 1983, respondent filed an answer in which it admitted liability for the loads shipped on September 15, September 17, September 22 and October 1, 1982, in the amount of \$21,468.25. An Order Requiring Payment of Undisputed Amount was issued on

July 14, 1983, requiring respondent to pay reparation to complainant in the amount of \$21,468.15.

CONCLUSIONS

Respondent has admitted liability for the lettuce sold on September 15, September 17, September 22, and October 1, 1982, and an Order Requiring Payment of Undisputed Amount has been issued on July 14, 1983, ordering respondent to pay reparation to complainant of the \$21,468.15 alleged by complainant to be due and owing in connection with these four loads. Therefore, the only transactions remaining in issue are the two loads allegedly sold by complainant on October 11, 1982, on an f.o.b. basis for a total of \$8,401.50. Respondent denies purchasing, receiving or accepting them.

We must first determine whether respondent purchased these two loads of lettuce. Complainant, as the party alleging that these sales were made, has the burden of proving its allegations by a preponderance of the evidence. *Richardo Castaneda d/b/a Peninsula Vegetable Exchange v. Valley Brokerage, Inc.*, 40 Agric. Dec. 737 (1981). Complainant has filed a sworn opening statement in which its salesman, Gary Hart, states that he sold these loads to respondent. Respondent, in a sworn answering statement, denies making such purchases and refers to its accounts payable ledger, which reflects no purchase made from complainant on October 11, 1982. Complainant has placed into evidence its invoices for the two alleged sales which clearly reflect the contract terms asserted by complainant (see Finding of Fact 6). Respondent, in its answer, states on two occasions that it did not purchase these two loads, for which it was "invoiced." In view of respondent's admission that it was invoiced for these two transactions, its failure to provide any evidence that it objected to the invoices is evidence of the truth of the contract terms which they contain. *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972). On the basis of all the evidence in the record, we conclude that complainant has sustained its burden of proving that these two sales were made to respondent.

Respondent contends that the two loads of lettuce at issue were never received by it. In f.o.b. sales such as these, complainant has the burden of showing that the produce was properly loaded on board the trucks at shipping point. Thereafter, respondent is considered to be in possession of the loads and bears the risk of loss. *Veg-A-Mix v. Pulillo Fruit Company*, 40 Agric. Dec. 1340 (1981). Complainant's invoices, received without objection by respondent, specifically identify the trucks on which the lettuce was loaded and

state the dates of shipment. We thus conclude that the lettuce was properly loaded. Respondent is, therefore, liable for the contract prices for these two loads totalling \$8,401.50, and its failure to pay such sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$8,401.50, with interest thereon at the rate of 13 percent per annum from November 1, 1982, until paid.

PHELAN AND TAYLOR PRODUCE COMPANY INC. v. SA-SO POULTRY
SALES CO., INC. a/t/a VALENTINE FOODS. PACA Docket No. 2-
6286. Decided April 3, 1984.

This case covered several different transactions made between respondent and complainant. The transaction of August 12th 1982 involved a discrepancy in contract price which was decided in behalf of the respondent due to the complainants lack of evidence, September 10, 1982 respondent denies having ever purchasing receiving or accepting this shipment, but acceptance of complainants invoice for the purchase is evidence that a sale did take place. It is found that respondent's contention that it rejected a shipment on September 15th is unfounded, as are any damages due to poor condition of the shipment.

Thomas Oliveri, for complainant.

Robert Bauer, Esquire, for respondent.

Andrew Y. Stanton, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,919.60 in connection with three loads of mixed vegetables shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for \$721 but denying liability for the remainder.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of

Practice (7 CFR 47.20) is applicable. Pursuant to such procedure the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Plaintiff filed an opening statement and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Phelan & Taylor Produce Company, Inc. corporation whose address is P.O. Box 458, Oceano, California

2. Respondent, Sa-So Poultry Sales Co., Inc., a/t/a Val Foods, is a corporation whose address is 609 North Am Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On August 13, 1982, complainant sold to respondent a partial truckload of lettuce consisting of 150 cartons of greenleaf lettuce at \$4 per carton, 200 cartons of romaine at \$4 per carton, 100 crates of romaine at \$4.50 per crate and 50 crates of celery at \$4 per crate plus \$60 top ice, \$22.50 for a Ryan recorder and \$325 cooling, totaling \$2,457.50 f.o.b. Von Winning Distributing Co., Salinas, California, acted as the broker. The lettuce was shipped to respondent which accepted it.

4. Complainant sent an invoice to respondent dated August 13, 1982, regarding the produce sold on August 13, 1982. The invoice stated that the 100 crates of romaine bore a price of \$4.50 per crate, but erroneously noted the total as \$550 instead of \$450. An undated memorandum of sale, prepared by the broker, contained the price for the 100 crates of romaine of \$5.50 per crate. This memorandum of sale was not sent to respondent.

5. Respondent has paid complainant \$2,457.50 for the produce sold on August 13, 1982.

6. On September 10, 1982, complainant sold to respondent a partial truckload of lettuce and cauliflower at a price, including ice, a Ryan recorder and cooling, of \$4,279.60 f.o.b. Von Winning Distributing Co. acted as the broker. The produce was loaded on a Ferran truck and shipped on September 13, 1982, in interstate commerce to respondent.

7. On September 13, 1982, complainant prepared an invoice reflecting the information set forth in Finding of Fact 6 and sent it to respondent, which received it without objection.

8. Respondent, to date, has failed to make any payment to complainant for the produce purchased on September 10, 1982.

9. On September 15, 1982, complainant sold to respondent a partial truckload of lettuce consisting of greenleaf lettuce, romaine lettuce in cartons and romaine lettuce in crates for a price, including

top ice and cooling of \$1,540. Von Winning Distributing Co. acted as the broker. The lettuce was shipped to respondent, which received and accepted it.

10. Upon receipt of the lettuce sold by complainant on September 15, 1982, respondent notified either complainant or the broker of problems in the load consisting of 90% decay in the greenleaf lettuce and 15% decay in the crated romaine lettuce. Complainant and the broker then discussed respondent's complaints, including respondent's statement that it had dumped the entire lot of greenleaf lettuce and would provide a dump slip, and respondent's intention to resell the romaine lettuce. Respondent never provided federal inspections, a dump slip, or an account of sales.

11. Respondent has failed to make any payment to complainant for the lettuce sold on September 15, 1982.

12. A formal complaint was filed on March 15, 1982, which was within nine months from when the causes of action herein accrued.

13. On May 3, 1983, respondent filed an answer in which it admitted liability for \$721 but denied liability for the remainder. An Order Requiring Payment of Undisputed Amount was issued on June 23, 1983, ordering respondent to pay reparation to complainant in the amount of \$721.

CONCLUSIONS

With respect to the first load in dispute which respondent admits purchasing on August 13, 1982, respondent claims that the 100 crates of romaine lettuce were sold at \$4.50 per crate or \$450, and complainant claims that the price was \$5.50 per crate or \$550, a difference of \$100. The broker prepared a memorandum of sale, showing the price to be \$5.50 per crate, but there is no allegation that this memorandum of sale was ever sent to respondent. Complainant's own invoice, attached to the complaint and prepared and sent to respondent on August 16, 1982, shows the price of \$4.50 per crate. It is our determination that complainant's invoice is worthy of much greater weight, as an admission against interest, than the broker's memorandum of sale. Therefore, respondent is without liability for the \$100 at issue in connection with the September 13, 1982, load.

Respondent denies purchasing, receiving or accepting the partial truckload which complainant alleges was sold to respondent on September 10, 1982. Complainant has introduced as its opening statement the affidavit of its sales manager, Ralph E. Beck, who states that the sale was made. However, respondent's president, William C. Levin, in an affidavit comprising respondent's answering statement, denies that the sale occurred. Complainant has sub-

mitted into evidence an invoice reflecting the terms of sale. Respondent, in both its answer and answering statement, admits receiving this invoice and has nowhere indicated that it made any objection to it. Respondent's receipt of complainant's invoice without objection is evidence of the truth of the contract terms reflected in such invoice. *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972). We, therefore, conclude that the sale was made to respondent, as alleged by complainant. Respondent's claim that it never received the produce is irrelevant since respondent's liability is not affected by whether or not the lettuce arrived at respondent's place of business. This is because the lettuce was sold on an f.o.b. basis, which shifts the risk of loss to respondent at the time the commodity is properly loaded on to the carrier, as complainant's invoice reflects was done here. *Veg-A-Mix v. Pupillo Fruit Co.*, 40 Agric. Dec. 1340 (1981). We thus conclude that respondent is liable for the contract price of \$4,279.60 for the September 10, 1982, load.

Turning to the September 15, 1982, load, respondent agrees that it purchased the produce for \$1,540, but alleges that the produce was in highly deteriorated condition upon arrival and respondent justifiably rejected it. Respondent also claims that it and complainant agreed to reduce the purchase price to \$721. Since respondent is claiming that the parties agreed to change the contract price, it has the burden of proving such agreement by a preponderance of the evidence. *Howard Farms Inc. v. Orval Kent Food Co., Inc.*, 41 Agric. Dec. 545 (1982). There is absolutely no evidence in the record to support the alleged agreement and we thus conclude that the contract terms were never changed. Respondent's contention that it rejected the load must also be denied, as there is no evidence that a clear, unmistakable intention to reject was ever communicated to complainant. *Mario Saihon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). By failing to properly reject the load, respondent is considered to have accepted it, rendering respondent liable for the contract price less damages due to any breach of warranty. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). There is some evidence in the record that a discussion took place among the parties concerning the alleged poor condition of the produce upon arrival at respondent's place of business, as both complainant's invoice and the broker's memorandum of sale pertaining to this transaction contain a reference to 90% decay for the greenleaf lettuce and 15% decay for the crates of romaine lettuce. However, no inspection report was ever provided to substantiate

these allegations. In addition, respondent has not presented any evidence to support its claim of dumping the greenleaf lettuce. Moreover, although respondent claims to have resold the romaine, it has not provided an accounting of the alleged resales, which would make it very difficult to prove damages even if we were to hold that complainant breached its warranty. We must, therefore, hold respondent liable for the contract price of \$1,540.

In summary, we have found respondent to be without liability for the August 13, 1982, load, liable for \$4,279 for the September 10, 1982, load, and liable for \$1,540 for the September 15, 1982, load. We will subtract from this figure the \$721 already awarded complainant by virtue of the June 23, 1983, Order Requiring Payment of Undisputed Amount. This leaves a total of \$5,198, and respondent's failure to pay complainant the sum is a violation of section 2 of the Act, for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, \$5,198, with interest thereon at the rate of 13 percent per annum from October 1, 1982, until paid.

CAL FRESH INC. v. NATURE FRESH INC. PACA Docket No. 2-6339.
Decided April 17, 1984.

Failure to pay in full—Decision.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,425.16, in connection with two loads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for \$1,425.92 but denying liability for the remainder.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evi-

dence in the form of verified statements as well as briefs. Complainant filed an opening statement and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Cal Fresh, Inc., is a corporation whose address is P.O. Box 4040, Salinas, California. At the times of the transactions involved in the set-off, complainant was licensed under the Act.

2. Respondent, Nature Fresh, Inc., is a corporation whose address is P.O. Box 183, Glencoe, Minnesota. At the times of the transactions involved in the complaint, respondent was licensed under the Act.

3. On August 13, 1982, complainant's representative, Steven M. Nelson, wrote a letter to respondent in which complainant offered to supply respondent with lettuce as follows:

Cal-Fresh, Inc. is willing to guarantee your firm supplies during the following periods of September, October, November, and December within a price spread of .08 to .095 cents per pound loaded on the truck. This price spread maybe [sic] negotiated by both parties daily, weekly, or monthly; whichever, they agree upon.

This proposal was accepted by respondent and the arrangement remained in effect through December, 1982.

4. On November 19, 1982, respondent purchased, received, and accepted in interstate commerce from complainant 12 bins of lettuce, consisting of 12,120 pounds. Respondent was charged \$.10 per pound plus \$.01 per pound cooling, for a total of \$1,333.20. On November 23, 1982, respondent purchased, received, and accepted in interstate commerce from complainant eight bins of lettuce, consisting of 8,424 pounds. Respondent was charged \$.10 per pound plus \$.01 per pound cooling, for a total of \$926.64. Respondent paid complainant the combined invoice prices of \$2,259.84 for these two transactions.

5. On November 27, 1982, respondent purchased, received, and accepted in interstate commerce from complainant 20 bins of lettuce, consisting of 18,400 pounds at \$.085 per pound plus \$.01 per pound cooling, for a total of \$1,748. On November 29, 1982, respondent purchased, received, and accepted in interstate commerce from complainant eight bins of lettuce, consisting of 7,128 pounds at \$.085 per pound plus \$.01 per pound cooling, for a total of \$677.16. Complainant prepared invoices reflecting these contract terms and sent them to respondent. Respondent has failed to pay any part of the combined invoice prices of \$2,425.16 for these two transactions.

6. A formal complaint was filed on April 25, 1983, which was within nine months from when the causes of action alleged therein accrued. An answer and set-off, in which respondent submitted liability for \$1,425.92 and asserted a set-off for \$999.24 in connection with the two transactions in the complaint and two additional transactions, was filed on June 17, 1983, which was within nine months from when the causes of action regarding the two additional transactions accrued.

CONCLUSIONS

In both the complaint and the set-off, the dispute centers on the terms of the contracts between the parties. The complaint alleges that respondent purchased two loads of lettuce on November 27 and 29, 1982, and under the terms of sale agreed upon on those dates, the price for each load was to be \$.085 per pound plus \$.01 pound cooling, or \$1,748 and \$677.16, respectively. Respondent admits liability for all but \$276 for the November 27 transaction and \$106.92 for the November 29 transaction. In its set-off, respondent alleges that it is owed a credit of \$999.24. This consists of \$276 for the November 27 transaction, \$106.92 for the November 29 transaction, and an additional sum based on its alleged overpayments on two previous transactions dated November 19, 1982, in the amount of \$252.72 and November 23, 1982, in the amount of \$365.60.¹ The basis for respondent's answer and set-off is an alleged agreement with complainant pursuant to complainant's letter of August 13, 1982. Respondent claims that, under the terms of complainant's letter, the sales price for all four transactions was \$.08 per pound.

We will first discuss the contract terms for the two loads of lettuce at issue in the complaint. In its opening statement, complainant denies that the agreement reflected in complainant's August 13, 1982, letter was in effect, alleging that respondent rejected complainant's offer made in such letter. This conflicts with complainant's reply filed in response to the set-off, in which complainant admits that the agreement was in effect for the months of September through December 1982. We thus hold that the terms of the contract set forth in the August 13, 1982, letter applied to the November 27 and 29, 1982, transactions. In accordance with these terms, the price per pound was to range from \$.08 to \$.095 "loaded on the truck" (Finding of Fact 3). Respondent contends that these prices were to include cooling, and we agree, as the cooling process

¹ The amount alleged in respondent's set-off actually totals \$1,001.24, but we will utilize the \$999.24 asserted by respondent.

takes place before produce is "loaded on the truck." However, the prices charged by complainant for the November 27 and 29, 1982, loads and reflected in its invoices, were fully in conformance with this price range, as the prices, including cooling, were \$.095 per pound for each load (\$.085 per pound plus \$.01 per pound cooling). Respondent's contention that these prices should have been \$.08 per pound, including cooling, is not supported by the August 13, 1982, letter or any other evidence in the record. We, therefore, conclude that the price terms claimed by complainant were in effect and that respondent is liable for \$2,425.16 for the November 27 and 29, 1982, loads.

With respect to respondent's set-off, its claim that it is without liability for \$382.92 for the November 27 and 29, 1982, transactions is based on respondent's allegation that the lettuce was priced at \$.08 per pound. This claim is obviously without foundation, as we have held that the contract price was \$.095 per pound, as asserted by complainant. Respondent's contention that it overpaid on purchases made on November 19 and 23, 1982, has merit, as each of these sales was for \$.10 per pound plus \$.01 per pound cooling, or \$.015 per pound in excess of the maximum charge of \$.095 per pound set forth in the August 13, 1982, letter. As there were 12,120 pounds contained in the November 19, 1982, load, and 8,424 pounds in the November 23, 1982, load, respondent paid an excess of \$308.16, and it is entitled to this amount as a set-off.

We have found complainant to be liable for \$2,425.16 for the November 27, and 29, 1982, loads. We will subtract from this the \$308.16 due respondent by virtue of its set-off, for a total of \$2,117. Respondent's failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$2,117, with interest thereon at the rate of 13 percent per annum from January 1, 1983, until paid.

TOM BENGARD RANCH INC. *v.* MUTUAL PRODUCE INC. PACA Docket
No. 2-6349. Decided April 18, 1984.

Thomas Oliveri, for complainant.

Alan L. Lewis, Esquire, Boston, Mass., for respondent.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$5,222.20 in connection with a transaction, in interstate commerce, involving a shipment of lettuce, a perishable agricultural commodity.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to the complainant. Also, respondent filed a counterclaim against complainant in the amount of \$2,940.00 in connection with the same transaction. In a reply thereto, complainant denied any liability to respondent.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, and respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Tom Bengard Ranch, Inc., is a corporation whose mailing address is P.O. Box 5156, Salinas, California 93915.

2. Respondent, Mutual Produce, Inc., is a corporation whose mailing address is P.O. Box 48-49, New England Produce Center, Chelsea, Massachusetts 02150.

3. At all material times, both parties were licensed under the Act.

4. On or about October 14, 1982, in the course of interstate commerce, complainant by oral contract sold 900 cartons of lettuce to respondent at an agreed f.o.b. price of \$6.00 per carton, plus 15 cents per carton brokerage, 65 cents per carton for cooling, and

\$22.50 for a Ryan temperature recorder, for a total f.o.b. price of \$6,142.50. Said contract was negotiated by Ed Given, Inc., a broker whose mailing address is P.O. Box 1602, Salinas, California 94760. The lettuce was not required to meet any United States grade standard, however good delivery standards applied, excluding bruising and/or discoloration following bruising. The broker issued a confirmation of sale, which was sent to and received by both parties.

5. The truckload of lettuce was shipped on October 14, 1982, from a loading point in the State of California to respondent in the Commonwealth of Massachusetts. The lettuce arrived at respondent's location early on the morning of October 20, 1982. The tape from the Ryan temperature recorder indicates that the temperature of the truck after it was cooled off, was maintained at around 40°F. for the first 3 days, at about 41°F. for the next day, and slowly rose to about 43°F. over the remaining portion of the trip (about 12 hours). At 7:35 a.m., on October 20, 1982, the load of lettuce, which was still on board the truck with the cooler operating, was the subject of a federal inspection. The inspection certificate issued thereafter indicates that the temperature of the lettuce ranged from 40°F. to 48°F. It further indicates that the condition of the lettuce was as follows:

Head s [sic] or portion of heads not affected by condition defects are fresh and crisp. WRAPPER LEAVES: average 1% decay. HEAD LEAVES: average 1% damage by Russet Spotting. 1 to 2 heads in most cartons, none in many, average 5% damage by Tipburn. 1 to 6 heads decayed per carton average 14% decay. Decay is Bacterial Soft Rot in various stages affecting 1 to 3 leaves."

6. At 9:00 a.m., on October 20, 1982, respondent notified the broker as to the condition of the lettuce. Thereafter the respondent, without any agreement by complainant, handled the lettuce for complainant's account. On October 27, 1982, respondent submitted an account of sales to complainant which indicated that the lettuce was sold, in a prompt and proper resale, for a total price of \$4,260.00, and that respondent's costs were as follows: \$22.50 for the Ryan recorder, \$585 for vacuum cooling, \$42.00 for government inspection, \$13.50 for sampling, \$98.00 for labor, \$10.00 as a terminal and delivery charge, \$2,800.00 for freight, and \$511.20 as its commission. It submitted a check to complainant in the amount of \$920.30.

7. The Federal-State Market News for the Boston Market, dated October 20, 1982, reflects the market price for California iceberg

lettuce as follows: "8.00-9.00 few 9.50 few best brands high as 10.50, fair appearance, 6.00-8.00 mostly 8.00."

8. The formal complaint was filed on April 22, 1983, which was within 9 months after the cause of action herein accrued.

CONCLUSIONS

The regulations issued pursuant to the Act permit lettuce to have a maximum of 15% condition defects at destination. Of the 15% condition defects, not more than 5% may be decay affecting any portion of the head. Inasmuch as the inspection certificate pertaining to the day of arrival inspection indicates that the subject load of lettuce containing 20% condition defects including 14% decay, it is clear that the lettuce failed to make good delivery. The question which arises from this is which party, the complainant/shipper or respondent/receiver, shall bear the burden of the loss. Generally, in an f.o.b. sale, the shipper is obligated to place the produce on board the means of transportation in suitable shipping condition, and the buyer assumes all risk of damage and delay in-transit, not caused by the seller, irrespective of how the shipment is billed. See 7 CFR § 46.43(i). The Regulations define "suitable shipping condition" as follows:

* * * [T]he commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. If a good delivery standard for a commodity is set forth in § 46.44, and that commodity at the contract destination contains deterioration in excess of tolerance provided therein, it will be considered abnormally deteriorated. The seller has no responsibility for any deterioration in transit if there is no contract destination agreed upon between the parties. [7 CFR § 46.43(j)]

In the instant case, the dispute between the parties focuses on whether or not there were abnormal transportation services. Complainant contends that the tape from the Ryan recording thermometer demonstrates that transportation services and conditions were in fact abnormal. The burden of proving that transportation was abnormal rests upon complainant. See *Tenneco West Inc. v. Gilbert Distributing Inc.*, 38 Agric. Dec. 488 (1979). The tape from the Ryan temperature recorder indicates that for approximately the first 72 hours the lettuce was carried at 40°F., that it was carried at 41°F. for the next 24 hours and that for the approximately 30 hours remaining of the in-transit time the lettuce was carried at around 42-43°F. The complainant cites these temperatures, in addition to

the product temperature reflected on the inspection certificate, 43 to 48°F., as proving abnormal transportation services. However, we do not believe that the temperatures reflected by the Ryan recorder thermometer can be determined to be the proximate cause of the damage to the lettuce. While those temperatures may be at the high range of what one might consider the normal shipping temperature for lettuce, we cannot say that this temperature was so high as to have caused lettuce in suitable shipping condition to show 20% damage, including 14% decay, upon arrival at respondent's location after a normal shipping time of about 5½ days. Accordingly, we are unable to find that complainant has met its burden of proving the shipping conditions for this load of lettuce to have been abnormal. In any event, it should be noted that in a long line of cases we have held that where the condition of lettuce on arrival at contract destination is such as to clearly indicate that it would have been abnormally deteriorated at such time and place even though it was handled under abnormal transportation service and conditions, then the warranty should still be applicable. See *Sanbon Packing Co. v. Spanda Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969). See also, *Inter Harvest Inc. v. Vegetable Market of Cleveland Inc.*, 34 Agric. Dec. 697 (1975); *Jack T. Baillie Co. v. S & K Farms*, 32 Agric. Dec. 1874 (1973); *Stewart Packing Co., Inc. v. Raymond Heller Co.*, 21 Agric. Dec. 960 (1962); and *Anonymous* 12 Agric. Dec. 694 (1953). In this case, considering the amount of Bacterial Soft Rot alone we feel that it is clear that this lettuce would not have made good delivery even had we judged the overall temperatures to have been abnormal. The complaint should, therefore, be dismissed.

Respondent has counterclaimed in the amount of \$2,940.00, which it computes by taking the difference between the \$7,200.00, which is the sum of the market price of \$8.00 on the date of delivery for each of the 900 cartons, and \$4,260.00, which is the amount it was able to sell the lettuce for in a prompt and proper resale. Under the Act, respondent is entitled to claim such damages. *J. M. Dungan Trustee v. J. Sachs Co.*, 16 Agric. Dec. 754 (1957). Uniform Commercial Code section 2-714.

Therefore, on the basis of all of the evidence in the case, we conclude that complainant is obligated to respondent in the amount of \$2,940.00, and that complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

The complaint is dismissed.

PHOENIX VEGETABLE DISTRIBUTION v. C. H. ROBINSON CO. PACA
Docket No. 2-6360. Decided April 18, 1984.

Thomas Oliveri, for complainant.

Owen Gleason, Esquire, Eden Prairie Minnesota, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,936.87, in connection with three transactions, in interstate commerce, involving shipments of turnips and/or green onions both of which are perishable agricultural commodities.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto, denying any further liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent also filed brief.

FINDINGS OF FACT

1. Complainant, Phoenix Vegetable Distributors, is a corporation whose mailing address is 1932 West McDowell Road, Phoenix, Arizona 85009.

2. Respondent, C. H. Robinson Co., is a corporation whose mailing address is 7525 Mitchell Road, Eden Prairie, Minnesota, 55344. Respondent also has an office at 1762 Sixth Avenue South, Room 120, Seattle, Washington 98134. At all material times, respondent was licensed under the Act.

3. On or about June 10, 1982, in the course of interstate commerce, complainant sold the following items to respondent on the following terms: 300 cartons of green onions at a price of \$4.10 f.o.b. per carton plus 50 cents per carton cooling (\$1,380), and 40 25 lb. sacks of turnips at \$2.85 f.o.b. per sack (\$114), plus \$14 for top ice, for a total agreed contract price of \$1,508. The shipment was received and accepted by respondent. Subsequent to its receipt and acceptance, respondent paid complainant \$162.88 with respect to this shipment.

4. On or about June 21, 1982, in the course of interstate commerce, complainant sold to respondent 200 cartons of green onions at a price of \$4.10 f.o.b. per carton plus 50 cents per carton for cooling (\$920), plus \$14 for top ice, for a total agreed contract price of \$934. The shipment was received and accepted by respondent, but respondent has paid complainant nothing with respect to this shipment.

5. On or about June 21, 1982, in the course of interstate commerce, complainant sold to respondent 1200 cartons of U.S. No. 1 green onions at an agreed f.o.b. price of \$4.10 per carton plus 50 cents per carton for cooling (\$5520), plus a \$28 charge for top ice, for a total f.o.b. contract price of \$5,548. The onions were delivered to respondent's customer, Associated Grocers, Inc., in Seattle, Washington, on June 23, 1982. At 8:00 a.m. on that date, the 1200 cartons of onions were the subject of a Federal destination point inspection at the warehouse of Associated Grocers, Inc. The inspection certificate relating to that inspection (No. E 108811) reflects that the temperature of the onions was 34°F. to 36°F., and that the onions failed to grade U.S. No. 1 on account of condition defects. The certificate relates that the condition of the onions was as follows: "Bulbs firm, tops fresh and good green color. From 6 to 50%, average 22% damage, including 9% serious damage by broken, bruised and/or water soaked leaves. No decay." Subsequent to the inspection, respondent notified complainant that it was rejecting the onions. Complainant requested that respondent place the onions for complainant's account, but due to the condition of the load, respondent was unable to do so. Complainant then requested that respondent have the onions reiced, which respondent did incurring a charge of \$55.91, and await further instructions from complainant. On the next day, June 24, 1982, complainant notified respondent to have the onions reiced a second time, which complainant did incurring an expense of \$36.21, and to have the onions reloaded on board a truck for carriage to complainant's customer, Paul's Pac, Inc., in Salinas, California. Respondent complied with complainant's request thereby incurring additional expenses of \$30

for the reloading of the onions, and \$600 for freight to Salinas California.

6. On June 26, 1982, at 9:00 a.m., 400 cartons of green onions were the subject of a lot inspection at the Paul's Pac, Inc., location in Salinas, California. A shipping point inspection certificate, No. B 032948, was issued subsequent thereto. This shipping point inspection certificate indicated that the defects on the onions which were inspected were within tolerance.

7. An informal complaint was filed on November 26, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves three shipments of turnips and/or green onions made by complainant to respondent. In point of fact, however, the case only involves a dispute between the parties over one of these shipments. That shipment contained 1200 cartons of green onions having a total f.o.b. value of \$5,548. With regard to this shipment, the dispute centers upon the validity of the destination point inspection made on June 23, 1982, at respondent's customers' location in Seattle, Washington. The inspection certificate issued subsequent thereto indicates that this shipment of onions was badly damaged, having 22% damage including 9% serious damage. On the basis of this inspection, respondent rejected the load. Complainant alleges that this rejection was arbitrary, and cites a June 26, 1982, inspection as establishing that there was nothing wrong with the onions. However, the inspection certificate which complainant offered as proof noted that the inspection was of only 400 cartons of onions rather than of 1200 cartons which was the amount shipped from Arizona and inspected in Seattle. Moreover, the certificate indicated that the inspection was a shipping point inspection rather than a destination point inspection which raises questions as to the origin of the onions, and furthermore contains no information by which we could conclude that the onions inspected on June 26, 1982, were the same onions that were inspected on June 23, 1982. Complainant offered no other evidence to support its contentions. Consequently, we conclude that the complainant has offered no evidence whatsoever that respondent's rejection was arbitrary. Since the onions were not as warranted, respondent's rejection was proper.

Subsequent to respondent's proper rejection, the parties abrogated their initial contract. Such contract was therefore made null and void. Although complainant is, therefore, not entitled to the damages it claims for this shipment, respondent did suffer damage as a consequence of complainant's failure to deliver conforming

goods and is entitled to such damages. In effect, respondent claims such damages as a set off against the contract prices for the other two shipments involved in this case. The damages suffered by respondent includes the \$1,500 cost of freight from Arizona to Seattle, Washington, \$92.12 for top ice, \$600 for freight from Seattle, Washington, to Salinas, California, and a \$30 loading charge, or \$2,222.12. Respondent also claims that it should recover the inspection charge of \$57. However, such charges are not recoverable as damages. *Hilvert v. California Produce*, 24 Agric. Dec. 1001 (1927).

There is no dispute as to the remaining two loads of produce. Respondent received and accepted them, and agrees it is obligated to complainant for the full contract prices thereof, or \$2,442. Of this amount respondent has paid complainant \$162.88. This leaves a balance due of \$2,279.12. If we deduct respondent's damages on the June 21, 1982, shipment of green onions, or \$2,222.12, we have a balance of \$57 still due complainant from respondent. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant \$57, as reparation, with interest thereon in the amount of 13% per annum from August 1, 1982, until paid.

JAMES N. RUBINSTEIN *v.* H & H PACKING HOUSE. PACA Docket No 2-6184. Decided April 25, 1984.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$35,164.29 in connection with four shipments, in interstate and foreign commerce, involving avocados, a perishable agricultural commodity.

A copy of the report of investigation was served on both parties. Respondent also was served with a copy of the formal complaint and filed an answer thereto denying any liability to complainant.

An oral hearing was held in Los Angeles, California, on August 2, 1983, before Presiding Officer Edward M. Silverstein. One witness appeared for the complainant; three witnesses appeared for

the respondent. Subsequent to the hearing, the parties were given the opportunity to submit further evidence by way of affidavit. Each party did so. Also, each party filed a brief.

FINDINGS OF FACT

1. Complainant, James N. Rubinstein, is an individual whose mailing address is 25 East 86th Street, New York, New York 10028.

2. Respondent, H & H Packing House, Inc., is a corporation whose mailing address is P.O. Box 548, Yorba Linda, California 92686. At all material times, respondent was licensed under the Act.

3. On or about April 18 and May 4, 1981, complainant purchased a total of 6,630 flats of 30 count, and 3,162 flats of 35 count, Hass avocados, a perishable agricultural commodity, at a total agreed price of \$45,777.60, by oral contract from respondent. The term of sale was f.o.b. On May 6, 1981, complainant paid respondent in full for the avocados.

4. When delivered to complainant at respondent's Yorba Linda, California, location, the pulp temperature of the avocados ranged from 40°-44°F. The subject fruit had been picked within the preceding 96 hours, and had spent most of that time in either respondent's pre-cooler or its packing house, both of which have temperature ranges of 38°-40°F. The fruit had been harvested in the San Diego area where the air temperature ranged from 63°-70°F. during the period April 28-May 6, 1981.

5. In order for a Hass avocado to begin to naturally ripen, the fruit must be subjected to temperatures exceeding 70°F. for around 72 hours.

6. On or about April 23, May 4, and May 6, 1981, the avocados which complainant purchased were placed in four "Sealand" containers, of the M-10 series, by respondent, pursuant to complainant's instructions, for shipment in foreign commerce to complainant's customer in Paris, France. The four Sealand containers (Nos. 120652, 120688, 120017, and 120169) were routed as follows:

(a) Nos. 120752 and 120688 were loaded on April 28, 1981 and hauled by tractor to Portsmouth, Virginia. They were loaded on board Sealand container ship "Market," and shipped to Rotterdam, Holland, on voyage #145-E, leaving on May 3, 1981, and arriving on May 13, 1981. From Rotterdam, the containers were hauled to Paris, and unloaded and inspected on May 14-15, 1981.

(b) No. 120017 was loaded on May 4, 1981, and hauled to Portsmouth, Virginia, by tractor. It was loaded on board the Sealand "Voyager," and shipped to Rotterdam, Holland, on Voyage #10-E, leaving on May 9, 1981, and arriving on May 17, 1981. Upon arriv-

al, the container was hauled to Paris, France, arriving on May 20, 1981, where it was unloaded and inspected.

(c) No. 120169 was loaded on May 6, 1981, and hauled by tractor to Wilmington, North Carolina. There, it was loaded on board the Sealand "Venture," and shipped to Rotterdam, on voyage #134-E, leaving on May 10, 1981, and arriving on May 20, 1981. The container was hauled to Paris, France, where it was unloaded and inspected on May 22, 1981.

7. The tapes from the Ryan temperature recorders in each of the containers indicate that the temperatures in the four containers were maintained at around 40°F. This was the temperature requested by complainant.

8. All four containers were treated with Tectrol. Generally, the Tectrol process involves the modification of the atmosphere in a container which is tested for leaks, and sealed so as to maintain a low leakage rate. For Hass avocados, the atmosphere is modified to contain 2-3% oxygen, and about 5-10% carbon dioxide. Normally, the atmosphere contains 20.95% oxygen and .03% carbon dioxide. Bags of lime are added to absorb excess carbon dioxide which is given off by the avocados. It is not known whether the four subject containers were properly treated.

9. Some shipments of avocados which have been shipped in a modified atmosphere have arrived in a damaged condition. Such damage can occur in several ways. One way damage may occur is, if the container does not allow the fruit to breathe, the ethylene gas, which is given off by the avocados, will reduce the oxygen content to less than one percent. Damage may also occur if the carbon dioxide level varies from that which is recommended (5-10%), or if the oxygen level is reduced to too low a level by other causes.

10. Some shipments of Hass avocados made to European destinations have arrived in damaged conditions. The injury varied from small spots to brown discolored areas covering 25-40% of the rind. Generally, the injury was confined to the rind and the underlying pulp looked normal. However, in a shipment involving a Florida grown variety of avocado, where the temperature of the container was around 70°F. for six days, the pulp under the injured area was softer than that under the noninjured area. Such a damage was duplicated in a laboratory by storing the Florida avocados in a modified atmosphere container, containing .3% oxygen and no carbon dioxide, for 10 days at 50°F. It is difficult to diagnose the cause of damage in a commercial shipment of avocados which has had its atmosphere modified because, once the container is opened, the atmosphere becomes contaminated and cannot be tested.

11. Laboratory testing of the effect of a modified atmosphere on Hass avocados indicates that the best storage effects can be reached using a 2% oxygen and 10% carbon dioxide mixture with a temperature range of 42°-45°F. Concentration of carbon dioxide must remain below 15% to avoid injury to the avocados.

12. On May 15, 1981, container number 120652 was inspected by Gabriel Brocard, Surveyor of the Court of Appeal of Paris at the Paris location of complainant's customer (Rungis Fruits). It had arrived at 5:00 p.m. on May 14, 1981. The temperature in the container was around 46.4°F when it was opened, and the avocados' temperature ranged from 41°F. to 42.8°F. At the time of the inspection, 408 cartons of the shipment had been sent to a customer. The inspector described the condition of the avocados as follows: "certain of [the avocados] are covered with black stains and * * * are weak to the touch, having a butter-consistency at [68°F], the inside showing as much black stains." He, also, stated "that others, although green outside are very soft to the touch, sometimes just as soft as the ones that are black," and "that very few are green and still hard."

13. On May 15, 1981, container number 120688 was inspected by Edouard-Henri Freynet, a representative of the Comité Des Assureurs Maritimes De Paris at the location of complainant's customer (Rungis Fruits). He described the condition of the avocados as follows: "Green and hard fruits adjoining more pliant fruits and other ones even being very soft and weak." He also noted "browning on spots in the pulp."

14. On May 20, 1981, container number 120017 was inspected by Michel Rysoll, international surveyor and President of the Chamber of Arbitration at Strasbourg, at the Paris location of complainant's customer (Rungis Fruits). He recorded the condition of the avocados as follows: "The fruits are of homogeneous quality, but the majority of the cartons contain weak and soft to very weak and soft fruits."

15. On May 22, 1981, container number 120169 was inspected by Gabriel Broucard, surveyor of the Court of Appeal of Paris, at the Paris location of complainant's customer (Rungis Fruits). He recorded that the container temperature was 50°F. and that the temperature of the avocados was 41°F. He recorded the condition of the avocados as follows: "all the fruits are soft to the touch and they certainly are abnormally weak and soft, although being green outside * * *."

16. On May 21 and 22, 1981, Mr. P.P.Q. de Wildt of the European Marketing Research Center, United States Department of Agriculture, observed the four subject container loads of avocados. Al-

though cautioning that some of the fruit had arrived a week before his visit, he recorded the following observations:

* * * fruit in a given box did not ripen uniformly and fruit was rather soft for its color.

[The fruit * * * which reportedly arrived per SEAU 120017 on May 20, 1981, and fruit which was observed on arrival per SEAU 120169 on May 22, 1981, showed a rather distinct disorder. The fruit in the cartons was fairly green with some darker fruit in some cartons. However, some of the green fruit was soft and ready to be eaten on arrival. * * * The pulp was not discolored and the taste was acceptable.

17. When complainant learned of the problems with the avocados, he traveled to Paris, from California, in order to inspect and to determine how best to handle the avocados. In doing so, he expended \$3,960.00.

18. The cost to complainant for transporting the avocados from California to Paris was \$37,267.47. In addition, complainant expended \$912.00 for the Tectrol treatment of the containers.

19. Complainant billed Rungis Fruits a total of \$94,737.60 for the four containers of avocados.

20. After arrival of the avocados, complainant agreed to having Rungis Fruits handle them for his account. Subsequent to their sale, complainant received \$59,573.36 from Rungis Fruits for the four containers of avocados.

21. The formal complaint was filed on October 13, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant, as the moving party, has the burden of proving, by a preponderance of the evidence, all of the facts which are necessary for him to establish his case. Such burden includes proving the terms of contract, that the respondent breached the contract, and the resulting damages. *R.L. Peed v. F & G*, 32 Agric. Dec. 285 (1973). Since the instant case involves f.o.b. sales, such a burden would also include the burden of proving that the damage to the avocados was caused by the respondent, and was not damage caused in-transit. *Valley Packing Co. v. Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352 (1969). It should go without saying that, since it knew the avocados were to be shipped to Paris, respondent had the obligation to provide complainant with avocados which could make the trip without damage, assuming normal transportation services and conditions *R.C. Walter & Sons v. Gatz*, 31 Agric. Dec. 655 (1972).

The damages to the avocados was described by the French inspectors as weak and soft fruit. Some of them noted that although the avocados were weak and soft that the rind was still green. (Hass avocados' rind turns black as the fruit ripens). One inspector noted "browning on spots in the pulp." Such descriptions were confirmed by the U.S. Department of Agriculture employee who had the opportunity to view the avocados. Respondent and complainant expressed different opinions as to the proximate cause of the damage. Respondent took the position that the damage was caused by the modification of the atmosphere in the shipping containers; complainant took the position the respondent had allowed the avocados to sit in the field too long, and that the avocado pit had become too warm causing the avocado to ripen from the inside out rather than from the outside in as is normal.

Complainant's position is based merely on his theory that such events took place. However, the facts as testified to by respondent's employee belies complainant's theory. Mr. Daren House testified that the avocados moved from the trees to respondent's pre-cooler within 12 hours of picking, that the pre-cooler maintained a temperature of around 40°F., and that after pre-cooling the avocados were moved to the respondent's packing shed where the temperature was around 40°F. also. He further stated that the pulp temperature of the avocados sold to complainant was checked and that it ranged from 40°F. to 45°F. Moreover, since the air temperature in the San Diego, California, area during the critical period of time did not exceed 70°F., it is unlikely that the fruit could have gotten warm enough for complainant's theory to have any merit. Complainant, although being given full opportunity to do so, did not challenge this testimony with evidence to the contrary.

Respondent argues that the Tectrol conditioning of the four containers was the cause of the damage. In support thereof, he offered the testimony of Mr. Richard Seaton who has considerable experience with shipping avocados in containers with modified atmospheres. Mr. Seaton testified that, while some steamship companies had required that containers have modified atmospheres, it was no longer a requirement. He further stated that it was no longer a standard procedure to have avocados Tectrol treated for export because of the problems which arose with some loads. The damage to the avocados he described as being caused by their going "anaerobic." He described such damaged fruit as having gradations of green and darkening, nothing black, with interior destruction and uncontrollable softening. In another instance, he described the avocados as having turned "a funny color, [with] purplish designs on it and strange things."

There is other evidence in the record, in the form of reports of authoritative studies, which supports respondent's position. In a report entitled "Injury to Avocados By Insufficient Oxygen and Excessive Carbon Dioxide During Transit," 94 *Proc. Fla. State Hort. Soc.* 299-301 (1981), D.H. Spaulding and F.J. Marousky (both employees of the Department of Agriculture) described injury to avocados shipped from California to Europe in containers with modified atmospheres, as follows:

The injury varied from small spots to brown discolored areas covering 25-40% of the rind. * * * Injury was confined to the rind and the underlying pulp generally looked normal. However in one shipment of injured 'Booth 8' avocados, the fruit softened normally in 6 days at 70°F (21°C), but the pulp under the injured areas was softer than under noninjured areas.

The authors concluded:

The laboratory results indicate that symptoms similar to those encountered in MA [modified atmosphere] shipments to Europe can be produced by exposure of avocados to low-O₂ (less than 1%) or a combination of low-O₂ and high-CO₂ (25% or higher). However, no atmosphere analyses were made of the commercial containers in which injured avocados were found by receivers in Europe. Once the container is opened and the damage found, it is too late to obtain an atmosphere sample. Greater care is needed to ensure proper precooling to keep respiration low during transit and, if a MA is used, more care must be taken to assure that ventilation is sufficient to avoid the state of insufficient O₂ and excessive CO₂ that can injure the avocados.

Other authorities also have reported damage to avocados after storage in modified atmosphere treated containers. See Salama, Grierson, and Oberbacher, "Storage Trials With Limes, Avocados, and Lemons in Modified Atmospheres," 78 *Fla. St. Hort. Soc.* 353-8 (1965); carbon dioxide damage to Florida avocados in concentrations as low as 3%.

It is noted that none of the damages described in these studies seem to be precisely the damage which the subject avocados had (as described by the French inspectors). * However, sufficient questions

* In a report, a part of which is in the record and the remainder of which we take official notice, entitled "Current Recommendations of Atmospheres for Transport and Storage of Tropical Fruit," Dr. Donald Spaulding, a Department of Agriculture official reports that bananas subjected to a toxic concentration of carbon dioxide remained green but turned soft. He cites two other studies in support of his report:

Continued

are raised by Mr. Seaton's testimony and these reports for us to be unable to conclude that complainant has satisfied his burden of proving that the damage which is described by the French inspectors was not caused in-transit. Therefore, based on all of the evidence, we conclude that the complaint should be dismissed.

Respondent is the prevailing party and is entitled to an award of fees and expenses. However, it has failed to file a claim therefor, and has waived its right thereto.

ORDER

The complaint is dismissed.

In Re: DANNA AND DANNA INC. v. PANTRY PRIDE ENTERPRISES.
PACA Docket No. 2-6287. Decided April 25, 1984.

Effective rejection—warranty of suitable shipping condition—Decision.

Respondent was shipped produce that it contended did not arrive according to warranted condition and was rejected by it and consigned to the railroad that had shipped the produce. Date of rejection renders it ineffective, and respondent is found liable for contract price.

Thomas Oliveri, for complainant.

Howard F. Gordon, Esquire, Fort Lauderdale, Florida, for respondent.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Jusicial Officer

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). Complainant filed a timely complaint seeking an award of reparation in the amount of \$5,110.50 in connection with the shipment to respondent of one railway carload of honeydew melons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying any liability to complainant.

Scott, "The Use of Polyethylene Bags to Extend The Life of Bananas After Harvest," 27 *Food Technol. Aust.* 481-482 (1975); and Woodruff, "Modified Atmosphere Storage of Bananas," 9 *Mich. State Univ. Hort. Rept.* 80-94 (1969). Such a condition is analagous to the condition of the avocados in the instant case in that they turned soft but stayed green.

The amount of damages claimed in the formal complaint does not exceed \$15,000, and accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Danna & Danna, Inc., is a corporation whose address is P.O. Box 5428, San Jose, California.

2. Respondent, Pantry Pride Enterprises, Inc., is a corporation whose address is P.O. Box 47-110, Northwest Branch, Miami, Florida. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 17, 1982, complainant sold and shipped from loading point in the state of California to respondent in Miami, Florida, one railway carload consisting of 1920 cartons of honeydew melons, at \$2.40 per carton, plus 25 cents per carton for palletization and \$22.50 for a temperature recorder, or a total amount of \$5,110.50 f.o.b.

4. The carload of honeydews arrived at respondent's place of business on the morning of October 1, 1982, at 7:30 a.m. On October 3, 1982, at 7:45 a.m., the honeydews in the railway car were Federally inspected with the following results in relevant part:

WHERE INSPECTED: Applicant's siding

Condition of Equipment: Temperature Control Unit In Operation.

Products Inspected: HONEYDEW MELONS in cartons printed "42nd Street, Growers & Shippers Danna & Danna, Main Office: San Jose, Calif." marked "5" Count. APPLICANT STATES: 1920 Cartons.

Condition of Load: Through Crosswise load 2 pallets 3 Rows 10 Layers. Adjustable load dividers locked in place at doorpost "A" end of car.

Condition of Pack: Tight.

Temperature of Product: Various Locations 43°F to 45°F.

Size: Fairly uniform.

Quality: Mature, well formed. Grade defects average 5%, scars.

Condition: Mostly firm, some ripe and firm. Mostly greenish white, some creamy white. None in most cartons, 1 to 2 melons in many, average 8% damage by light to dark brown discoloration. No decay in most cartons, 1 decayed melon in many, average 7% Bacterial Soft Rot in various stages affecting stem ends.

Grade: Meets quality requirements but fails to grade U.S. No. 1 only account condition.

Remarks: Inspection and certificate restricted to product and lading in initial 6 pallets being unloaded from doorway area, upper 4 layers of 2 complete pallets in doorway area, and remaining upper 2 layers of load "B" end of car. This certificate supersedes Federal Certificate No. E206865.

5. On October 4, 1982, respondent rejected the carload of honeydews to the railroad and notified the broker, Western States Brokerage, of Salinas, California. The broker notified complainant on October 4, by telephone that such rejection had taken place.

6. The formal complaint was filed on March 17, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover the f.o.b. purchase price of the carload of honeydew melons from respondent. Respondent alleges by way of defense that complainant waived any right to assert a claim for damages against respondent "on account of complainant's silence in the face of an affirmative duty to object to respondent's rejection of the commodity. . ." In addition respondent alleges that the honeydews were nonconforming when tendered, and that subsequent to respondent's timely rejection, complainant through its employee, P. A. Danna, reconsigned the honeydews by instructing the railroad to dispose of them. Respondent also alleges that complainant has failed to disclose how much, if any, funds were realized from the sale of the honeydews by the railroad, and that complainant would be unjustly enriched if it were allowed full recovery against respondent as well as to recover from the railroad.

Complainant has alleged that the carload of honeydews arrived at respondent's place of business in Miami at 7:30 a.m. on October 1, 1982. Complainant cites the "Report of Fruit and Vegetable Inspection" conducted by Florida East Coast Inspections, Inc., at 1:00 p.m. on October 4, 1982, as proof of this allegation. Such report, which is attached as an exhibit to the Department's Report of In-

vestigation, does show that a protest was filed by the consignee and received on "10/01/82, Time 7:30 AM." Respondent at no point challenged complainant's contention that the carload of honeydews was received on October 1, and we find that this was the date on which the honeydews were received. Since respondent's alleged rejection took place on October 4, 1982, such rejection was clearly ineffective. See 7 CFR 46.2(cc)(2). An ineffective rejection amounts to an acceptance of a commodity (see *Dew-Gro, Inc., a/t/a Central West Produce v. First National Super Markets, Inc.*, PACA Docket No. 2-6145, 42 Agric. Dec. ____ (1983)), and accordingly any question of complainant responding to respondent's attempted rejection does not arise.

Respondent's second defense, that the honeydews were nonconforming when tendered, is also without merit. The honeydews were sold on an f.o.b. basis, and accordingly the warranty of suitable shipping condition applicable in f.o.b. sales applied to such honeydews. See 7 CFR 46.43(j). Such warranty provides in relevant part that "if the shipment is handled under normal transportation service and conditions" delivery will be assured "without abnormal deterioration at the contract destination agreed upon between the parties." The warranty is not in effect unless transportation services and conditions are normal and the burden of proof is upon the receiver who accepts goods to prove both normality of transportation and abnormal deterioration. *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980) and *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969). Complainant has contended that the transit time (approximately 2 weeks) between the west coast and Miami, Florida is abnormal. Respondent has offered no evidence showing that such time is normal. We conclude that respondent has failed to establish that transportation service and conditions were normal, and accordingly does not have benefit of the warranty of suitable shipping condition.

Respondent next contends that complainant should be estopped from asserting a claim for damages against respondent because complainant through its employee reconsigned the honeydews by instructing the carrier to dispose of the commodity. However, we are convinced that the record shows that it was respondent who rejected the honeydews to the railroad. In any event, as we have before found, respondent's rejection vis-a-vis complainant was ineffective and amounted to an acceptance. Consequently, respondent is the party who retained responsibility for the disposition of the honeydews.

Respondent's last defense in regard to possible unjust enrichment if complainant is allowed to recover the full purchase price of

the honeydews is also without merit. The record reveals that complainant merely telephoned the railroad subsequent to its being given notice by the broker of respondent's prior rejection to the railroad, and instructed the railroad to handle the honeydews for the account of whom concerned. Since respondent accepted the honeydews and retained responsibility for their disposition, respondent had the responsibility of showing what proceeds, if any, were realized by the railroad in excess of freight, and to whom payment of such proceeds was directed.

Since respondent accepted the honeydews it became liable to complainant for the full purchase price thereof. Respondent has not shown that complainant breached the contract of sale or any other duty relative to the honeydews. Accordingly, we find that respondent's failure to pay complainant the full purchase price of the honeydews, or \$5,110.50, is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$5,110.50, with interest thereon at the rate of 13 per cent per annum from October 1, 1982, until paid.

WESTERN TOMATO GROWERS & SHIPPERS, INC. v. C. H. ROBINSON
COMPANY and/or NORTHWEST PRODUCE COMPANY INC. PACA
Docket No. 2-6340. Decided April 25, 1984.

Failure to pay in full—Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents, in the amount of \$4,875 in connection with the sale of a carload of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of

Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Respondent C.H. Robinson Company filed an answering statement and a brief.

FINDINGS OF FACT

1. Complainant, Western Tomato Growers & Shippers, Inc., is a corporation whose address is P.O. Box 2007, Stockton, California.

2. Respondent, C.H. Robinson Company (hereinafter, "Robinson"), is a corporation whose address is 7527 Mitchell Road, Eden Prairie, Minnesota. At the time of the transaction involved herein, Robinson was licensed under the Act.

3. Respondent, Northwest Produce Company, Inc. (hereinafter, "Northwest"), is a corporation whose address is 760 Kasota Avenue, S.E., Minneapolis, Minnesota. At the time of the transaction involved herein, Northwest was licensed under the Act.

4. On approximately September 10, 1982, complainant sold to Northwest, through Robinson acting as the broker, a carlot of tomatoes consisting of 2,340 cartons; 288 cartons at \$4.50 per carton, or \$1,296, 1,152 cartons at \$3.50 per carton, or \$4,032, and 900 cartons at \$2.50 per carton, or \$2,240, plus \$.15 carton palletizing, or \$351, for a total of \$7,929 f.o.b.

5. Robinson prepared an undated memorandum of sale reflecting the contract terms set forth in Finding of Fact 4, with an additional charge for a temperature recorder of \$22.50. The memorandum of sale was sent to both parties and received without objection.

6. The carlot of tomatoes left complainant on September 11, 1982, and was shipped in interstate commerce to Northwest, where it arrived on September 22, 1982. After arrival, on September 23, 1982, at 10:45 a.m., the tomatoes were subjected to a federal inspection which revealed the following condition:

Average approximately 5% green and breakers, 25% turning and pink, 6% light red and red. Average 1% soft. Decay in most samples 2 to 14%, some none, few 54%, average 8% Gray Mold Rot, Rhizopus Rot, Phytophthora Rot and Bacterial Soft Rot in various stages. Partly crushed cartons adjacent spacer show from 4 to 16% of tomatoes badly bruised.

7. On September 23, 1982, subsequent to the inspection, Northwest informed Robinson of its desire to reject the load. Robinson telephoned complainant and conveyed the inspection results and Northwest's desire to reject. Complainant authorized Robinson to grant Northwest protection if Northwest would accept the load.

and Northwest agreed to these terms. Robinson prepared and sent complainant a speed letter dated September 23, 1982, reflecting this agreement, which stated as follows: "Per our phone conversation and with your authority, I have given customer protection on tomatoes that arrived bad. I will let you know disposition ASAP." Complainant never objected to this speed letter.

8. On October 5, 1982, Northwest reported to Robinson that it had suffered losses totalling \$4,425 on the load of tomatoes, and Robinson informed complainant of these losses. Complainant stated that it was unhappy with these results and asked that Robinson attempt to obtain a better settlement with Northwest. Robinson informed complainant that it was unsuccessful in such attempt, and complainant then told Robinson that it authorized Northwest to deduct these losses. On October 5, 1982, Robinson sent complainant a "Confirmation of Adjustment" stating as follows:

Per our phone conversation and with your authority customer is deducting a total of \$4,425.00 for tomatoes that arrived bad. Customer will be deducting off your invoice as instructed. The loss breaks down as follows:

Lost 44 XL	\$255.20
Lost 265 Lg.	1,272.00
Lost 129 Med.	490.20
Repacking Labor	2,340.00
Inspections	67.60
	<hr/>
	4,425.00

Complainant received this confirmation and never objected to it.

9. Northwest prepared a check to complainant dated November 2, 1982, for \$3,504. Complainant accepted the check as partial payment. Northwest has, to date, failed to pay complainant the difference between the original invoice price of \$7,929 and the \$3,504 check, or \$4,425.

10. An informal complaint was filed on January 17, 1983, which was within nine months from when the alleged cause of action accrued. A formal complaint was subsequently filed on July 15, 1983.

CONCLUSIONS

Complainant brings this action against both respondents, jointly and severally. Complainant alleges that it sold a carlot of tomatoes to Robinson, which has made only partial payment. Robinson denies purchasing the tomatoes and contends that it acted as a broker only, arranging a sale from complainant to Northwest, and alleges further that it fulfilled all its broker's duties. Northwest

admits purchasing tomatoes from complainant and denies any liability for more than it has already paid, claiming that the tomatoes were in poor condition upon arrival. Northwest also agrees that Robinson was the broker only.

The first issue is whether Robinson purchased the tomatoes or acted solely as the broker in a sale from complainant to Northwest. Northwest agrees that Robinson was the broker. The record contains documents which Robinson claims it prepared and sent to complainant, an undated memorandum of sale and an October 5, 1982 confirmation of adjustment, which clearly show Robinson to be the broker, complainant the seller, and Northwest the buyer (Findings of Fact 5, 8). Robinson also sent complainant a September 23, 1982, speed letter confirming a telephone conversation in which Robinson gave protection to complainant's customer, Northwest, pursuant to complainant's authority (Finding of Fact 7). Complainant has never denied receiving these three documents nor alleged that it objected to them upon their receipt. Therefore, we are convinced that Robinson was in fact the broker, with complainant the seller, and Northwest the buyer, and made this status clear to the parties.

As we have determined that Robinson was acting as the broker, the next issue to be resolved is whether it violated any of its broker's duties. The duties of a broker are set forth in 7 CFR 48.28. Essentially, they are to negotiate a valid and binding contract, inform the parties of the contract terms, prepare and deliver to the parties an accurate memorandum of sale, and advise the parties of any unforeseen developments. Complainant has not alleged that Robinson failed to carry out any of these duties and the record is clear that Robinson issued a proper memorandum of sale (Finding of Fact 5), informed complainant of the inspection results upon arrival of the load (Finding of Fact 7) and conveyed complainant's offer of protection to Northwest (Finding of Fact 7). Therefore, Robinson fulfilled all its broker's duties and is without any liability to the complainant.

With respect to the liability of Northwest, it admits purchasing, receiving and accepting the tomatoes which were sold on an f.o.b. basis and, therefore, became liable for the contract price less damages due to any breach of warranty by complainant. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). Northwest claims that the contract price was changed after the tomatoes arrived because of condition problems revealed by a September 23, 1982 federal inspection. Complainant asserts that the inspection occurred too long after the date of shipment, September 11, 1982, to properly indicate any breach of war-

ranty by complainant. However, whether or not there actually was a breach of warranty is irrelevant, as the record is clear that on September 23, 1982, complainant granted Northwest protection through Robinson, upon being informed that the tomatoes had arrived in bad condition. This is reflected by the September 23, 1982, speed letter of Robinson (Finding of Fact 7), to which complainant has not claimed that it made any objection. In addition, complainant has not alleged that it made its offer of protection without knowledge of the date the inspection occurred. Complainant has not denied receiving an October 5, 1982, Confirmation of Adjustment from Robinson, setting forth the \$4,425 in losses claimed to be incurred by Northwest, or alleged that it ever objected to this confirmation. In light of these factual circumstances, we conclude that complainant agreed to change the contract terms by giving Northwest protection in the amount of \$4,425.

We have found Robinson to be without liability, as it acted as a broker only and properly performed its broker's duties. We have also found Northwest to be free from liability as a result of its compliance with the changed contract terms agreed to by complainant. Therefore, the complaint must be dismissed against both respondents.

ORDER

The complaint is hereby dismissed.

EDWARD CASTONGUAY FARMS v. S. FRIEDMAN & SONS INC. PACA
Docket No. 2-6373.

Failure to pay freight charges—Decision.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,600 in connection with the sale of a load of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, Edward Castonguay Farms, is an individual whose address is 17250 S.W. 299 Street, Homestead, Florida.

2. Respondent, S. Friedman & Sons, Inc., is a corporation whose address is P.O. Box 144, Blue Island, Illinois. At the time of the transaction involved in the complaint, respondent was licensed under the Act.

3. On approximately April 19, 1982, Lawrence Curtiss, Wayland, New York, acting as a broker, called respondent on behalf of complainant, seeking to sell 800 sacks of potatoes that complainant had shipped to Chicago, Illinois on April 17, 1982. Respondent agreed to purchase the potatoes for \$5,319 plus \$2 per sack, or \$1,600, for freight. Respondent received and accepted the potatoes.

4. Respondent eventually paid complainant \$5,319 for the potatoes, but refused to pay the \$1,600 in freight to the trucking company. Complainant eventually paid the trucking company \$1,600.

5. An informal complaint was filed on January 17, 1983, which was within nine months from the time the cause of action herein accrued. A formal complaint was subsequently filed on June 24, 1983.

CONCLUSIONS

The only issue herein is which party is responsible for the \$1,600 in freight which complainant ultimately paid to the trucking company. Complainant alleges that the potatoes were sold f.o.b., with respondent obligated to pay the freight. Respondent denies this allegation and claims that it agreed to handle the potatoes when the original receiver refused them. Respondent asserts that no price was mentioned at the time of sale.

If the sale was made with f.o.b. terms in effect, respondent was legally bound to pay the freight. *Pablo Hernandez d/b/a Pablo Distributors v. Paragon Distributing, Inc.*, 42 Agric. Dec. 438 (1983). Complainant's invoice is ambiguous on the question of the terms of delivery. While it does not state that the sale was on a delivered basis, which would obligate complainant to pay the freight (*Pablo Hernandez d/b/a Pablo Distributors v. Paragon Distributing, Inc.*, *supra*), it also does not contain any entry in the space under the

designation "F.O.B.", implying that f.o.b. terms were not to apply. However, there is additional evidence pertaining to the question of the agreed upon delivery terms. The broker, in a letter to the Department filed on January 17, 1982, in which he brought the informal complaint against respondent on complainant's behalf, stated that on April 19, 1982, respondent agreed to pay \$2 per sack in freight for the 800 sacks of potatoes. The broker's version of the contract term is usually given considerable weight, because the broker is considered to be unbiased, as it is without a financial interest in the outcome of the proceeding. *Homestead Tomato Packing Co., Inc. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984). The fact that in this case the broker filed the informal complaint on behalf of complainant against respondent is an indication of some bias in complainant's favor. However, there is no evidence in the record, nor has respondent alleged, that the broker has any financial stake in this proceeding. Therefore, we believe that the broker's statement is deserving of substantial weight and conclude that respondent did agree to pay \$1,600 for freight. Accordingly, respondent's failure to reimburse complainant for its expenditure of this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,600, with interest at the rate of 13 percent per annum from June 1, 1982, until paid.

STOWE POTATO SALES INC. v. M. PADULA PEELED POTATOES. PACA
Docket No. 2-6385. Decided April 25, 1984.

Failure to pay—Decision.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,166.26 in connection with five loads of potatoes shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal com-

plaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Stowe Potato Sales Inc., is a corporation whose address is RD #1, Box 445, Avoca, New York.

2. Respondent, M. Padula Peeled Potatoes, is an individual whose address is 225 South Murray Street, Bangor, Pennsylvania. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately June 13, June 28, July 6, and July 13, 1982, complainant sold to respondent a total of five loads of potatoes for a total of \$17,961.92 f.o.b. The potatoes were shipped in interstate commerce to respondent, which received and accepted them.

4. Respondent has paid complainant a total of \$5,795.66 for the five loads of potatoes, leaving \$12,166.26, which complainant claims to be due and owing.

5. An informal complaint was filed on February 25, 1983, which was within nine months from when the causes of action herein accrued. A formal complaint was subsequently filed on June 30, 1983.

CONCLUSIONS

In its brief, respondents admit owing \$6,000 out of the \$12,166.26 claimed by complainant for the five loads of potatoes at issue. Respondent denies any further liability, contending that the condition of the potatoes upon arrival was very poor.

Respondent admits purchasing these five loads of potatoes on an f.o.b. basis as well as receiving and accepting them. Respondent thus became liable for their contract price less damages due to any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *J. C. Matthews Pickle Co. v. Schnepfer Pickle Corp.*, 41 Agric. Dec. 471 (1983). Respondent's allegations of poor condition are not supported by any documentary evidence such as inspection reports. Respondent's bare allegations are not sufficient to sustain its burden of proof. Therefore, respondent is liable for the contract

price of the potatoes. The contract price was \$17,961.92, of which respondent has paid complainant \$5,795.66. Respondent's failure to pay complainant the remaining \$12,166.26 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

A final word should be said concerning complainant's claim in its opening statement that the Department failed to conduct a proper investigation of respondent's defenses to the complaint in accordance with the Rules of Practice. Not only is this claim completely irrelevant to the matters at issue in this proceeding but it is also contrary to the clear language of 7 CFR 47.3(b), which states that the nature of the investigation is left wholly to the discretion of the Department.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$12,166.26, with interest thereon at the rate of 13 percent per annum from August 1 1982 until paid.

GREEN VALLEY PRODUCE COOPERATIVE v. MARY F. SLOMA d/b/a NIAGARA TERMINAL PRODUCE. PACA Docket No. 2-6506. Decided April 25, 1984.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,571.72 in connection with 2 shipments of lettuce and celery in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Green Valley Produce Cooperative is a corporation whose mailing address is P.O. Box 2123, Salinas, California 93902. Respondent, Mary F. Sloma, is an individual d/b/a Niagara Terminal Produce, whose mailing address is 160-162 Niagara Frontier Food Terminal, Buffalo, New York 14206. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$1,571.72. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,571.72, with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

PANDOL BROTHERS INC. v. ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA. PACA Docket No. 2-6220. Decided April 26, 1984.

Complainant, *pro se*.

Charles J. Radner, Esquire, Milwaukee, Wisconsin, for respondent.

Dennis Becker, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$4,552.25 in connection with the sale and shipment of a truckload of Chilean grapes in interstate and foreign commerce.

Copies of the report of investigation made by the Department were served on the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to the complainant. Since the amount claimed as damages does not exceed \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. Both parties were given an opportunity to file briefs, and respondent did so.

FINDINGS OF FACT

1. Complainant, Pandol Brothers, Inc., is a corporation with a business address at Route 2 Box 388, Delano, California.
2. Respondent, Anthony J. D'Acquisto, is an individual doing business as Tropic Banana Company, with an address at 300 North

Van Buren Street, Milwaukee, Wisconsin. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about May 12, 1982, complainant sold to respondent 1,342 cases of fresh Chilean Grapes at a total contract price of \$15,199.50, delivered. Advance Brokerage Inc., located in Scottsdale, Arizona, acted as the broker with respect to the transaction. The shipment consisted of 496 flats of Almeria grapes sold at \$12.75 per flat, 408 flats of Ribier grapes sold at \$10.75 per flat, and 438 flats of Emperor grapes sold at \$10.25 per flat.

4. The grapes were shipped from a port on the East Coast of the United States to respondent's place of business in Milwaukee, Wisconsin, on or about May 12, 1982, and arrived in Milwaukee, Wisconsin on the afternoon of May 14, 1982. The grapes were unloaded from the truck by respondent, and placed into separate coolers. On May 14, 1982, respondent notified complainant through the broker that there was trouble with respect to the Almeria grapes and Ribier grapes, and that it would seek inspection of them. Because May 14, 1982 was a Friday respondent was not able to secure an inspection until the morning of May 17, 1982.

5. The grapes were federally inspected at 11:10 a.m. on May 17, 1982. The inspection certificate showed in pertinent part as follows:

Products inspected: Table GRAPES in lugs labeled "Chile 7 amigos, International Distribution, Pandol Bros. Inc., Delano, Calif." and stamped "Almeria" or labeled "Blue Anchor De Chile LTDA" Santiago Chile and stamped "Ribier" Each lot also stamped "18 Lbs., Net".

Approximately 350 lugs.

* * * * *

Condition: Each lot: Berries are generally firm and firmly attached to capstems. Stems mostly green, some turning brown and pliable.

Condition: Almeria lot: Average 1% shattered berries. In most lugs none, in some from 11 to 33% average 6% serious damage by wet and sticky berries. In most lugs none, in some from 6 to 22% average 3% decay, Gray Mold Rot occurring in nests. Ribier lot: From 6 to 28% average 12% serious damage by wet and sticky berries. From 3 to 12% average 5% serious damage by split and leaking berries. Less than 1% decay.

6. Respondent made full payment to complainant with respect to the Emperor grapes involved in this transaction. Respondent made deductions with respect to the Almeria and Ribier grapes, and paid complainant \$6,157.75 out of \$10,710.00 it owed with respect to these types of grapes, leaving an amount due and payable of \$4,552.25. Respondent stated that it was handling these types of grape for the account of complainant. However, it did not provide any account of sales showing the prices fetched on disposition of the grapes.

7. A formal complaint was filed on November 17, 1982, which was within nine months of the time the cause of action herein accrued.

DECISION

This proceeding involves a transaction in which three different types of grapes were shipped from Chile to Milwaukee, Wisconsin. There is no indication that there was any grade specification with respect to the shipment. Therefore, we conclude that the transaction involved a no grade contract. Also, the terms of the contract were that the grapes were sold on a delivered basis. Therefore, the shipper is responsible for the transportation conditions, and to assure that the grapes arrive at their destination so as to make good delivery. *Wallace Fruit & Vegetable Company v. Mathew Mercurio*, 18 Agric. Dec. 1327 (1959).

The grapes arrived in Milwaukee, Wisconsin on May 14, 1982. They were unloaded from the truck on which they were transported from port, and placed in two separate coolers. Because May 14, 1982 was Friday, respondent was not able to get a federal inspection until May 17, 1982. However, it notified complainant through the broker, Advance Brokerage, Inc., that it believed that there was trouble with the grapes, and that it was seeking a federal inspection with respect to them. The federal inspection covered approximately 350 lugs of grapes, 200 lugs of which involved the Almeria lot, and 144 lugs of which involved the Ribier lot. There was a third lot of grapes involved in the transaction, namely the Emperor variety, which were not inspected. The results of the federal inspection show that with respect to the Almeria lot there was 1% shattered berries, an average of 6% serious damage by wet and sticky berries, and an average of 3% decay, for a total of 10% condition defects. With respect to the Ribier lot the inspection showed there was 12% serious damage by wet and sticky berries, 5% serious damage by split and leaking berries, and less than 1% decay, for a total of 17% condition defects. Based on the federal inspection respondent claimed that it was rejecting the grapes, and selling

them for complainant's account. Eventually respondent paid complainant \$10,647.25 out of the total contract price of \$15,199.50. It claimed it was making full payment with respect to the 438 lugs of Emperor grapes sold at \$10.25 per lug, or \$4,489.50. It also claimed it was taking adjustments with respect to the Almeria and Ribier grapes in the total amount of \$4,552.25. However, respondent did not provide an accounting with respect to the prices fetched for the grapes, or any explanation as to how it arrived at the deduction of \$4,552.25.

Respondent claims that the federal inspection shows that the Almeria and Ribier grapes did not make good delivery. Complainant argues that the inspection was of too small a portion of the total number of lugs of these two types of grapes to be truly reflective of the condition of the entire lots. We agree with complainant. It has been held where there have been challenges made that inspections are of too small a portion of a load of goods to actually describe the condition of the entire load that such restricted inspections are not reliable indicators of the condition of an entire load. *Mario Saik-hon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975); *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982). That is not to say, however, that the inspection of 200 lugs of Almeria grapes and 144 lugs of Ribier grapes does not actually reflect the condition of that quantity of the load, thereby entitling respondent to damages with respect thereto. In order to elevate the restricted inspection to an inspection which was indicative of the condition of all the Almeria and Ribier grapes respondent argued that the inspector for the federal inspection service may have miscounted the number of lugs. This argument is not persuasive. By law the statements contained in a federal inspection certificate are prima facie proof of the truth of the contents of the document. (7 USC 499n(o).

There can be no question that the 200 lugs of Almeria grapes and 144 lugs of Ribier grapes which were inspected did not make good delivery. The Almeria grapes showed a total condition defects of 10%. The Ribier grapes showed total condition defects of 17%. Pursuant to 7 CFR & 51.885, Table II, for grapes to grade U.S. No. 1 table, the lowest classification of grapes given, there may not be more than 1% decay or more than 4% serious damage at destination. With respect to both lots there was more than 5% serious damage.

Having unloaded the grapes from the truck in which they were transported, and having placed them in its coolers, respondent accepted the shipment. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Therefore, it has the burden of proof to show that it suffered damages as a result of the condition of the

grapes. *Growers Produce v. Star Produce*, 33 Agric. Dec. 693, 696 (1974). It has failed to do so. A party claiming damages must show by credible evidence the amount of damage which it suffered. *Cal-Shred, Inc. v. George De Paoli Distributing Company*, 42 Agric. Dec. —, (1983); *Crane Distributing Company v. Anthony Abbate Fruit Distributors*, 31 Agric. Dec. 902 (1972). Such evidence is normally manifested by an account of sales showing the prices fetched for various sales of the commodity involved. As discussed above, respondent provided no such evidence.

In view of the above we find that the respondent has failed to pay complainant \$4,552.25, which is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$4,552.25, with interest thereon at the rate of 13 percent per annum from June 1, 1982, until paid.

HEBB-HENDRIX INC. v. CRAIG CAMPBELL d/b/a C&C PRODUCE COMPANY. PACA Docket No. 2-6321. Decided April 26, 1984.

Failure to pay—Decision.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,805.55 in connection with the sale of a truckload of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, Hebb-Hendrix, Inc., is a corporation whose address is P.O. Box 1915, Fort Pierce, Florida.

2. Respondent, Craig Campbell d/b/a C & C Produce Company, is an individual, Craig Campbell, whose address is P.O. Box 514, Lehigh Acres, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 23, 1982, complainant sold to respondent a truckload of tomatoes consisting of 957 crates of 6x6 Large tomatoes at \$4,785 and 543 crates of 6x7 tomatoes at \$1,900.50, plus \$.35 per crate processing, or \$525, for a total of \$7,210.50 f.o.b. It was understood that shipment was to be made to respondent's customer in Edinburg, Texas. The contract was negotiated by Dock Case, Burten, South Carolina, who acted as the broker.

4. The tomatoes were loaded in Beaufort, South Carolina, and shipped, on June 26, 1982, in interstate commerce to Edinburg, Texas.

5. A portion of the load was dropped off at one of respondent's customers in Texas. The remainder of the load arrived at Nicho Produce, Co., Edinburg, Texas, another of respondent's customers, and was subjected to a federal inspection on June 29, 1982, which resulted as follows, in relevant part:

WHERE INSPECTED: Applicant's dock and warehouse Edinburg, Texas

Products Inspected: TOMATOES in fiber board cartons printed, "Tomatoes Hebb-Hendrix, Inc., Beaufort, S.C. Produce of U.S.A. Net Wt. 25 Lbs." Cartons stamped, 6x6 & Lgr.". Applicant States 580 cartons remaining on trailer and 192 cartons unloaded and stacked on pallets in applicant's cooler. South Carolina stock.

Condition of Load: Partly unloaded. Loaded from side doors forward.

Condition of Pack: Lengthwise load; 5, 6 and 7 rows, 9 layers.

Temperature of Product: *NEAREST REAR DOORWAY:* Top 60°F. Bottom 60°F. *3/4 QUARTER LENGTH:* Top 60°F. 2nd. layer 60°F. *Lot In Cooler:* 60°F.

Condition: Approximately 5% green and breakers, 30% turning and pink, 45% light red and red. Average 2% serious damage by sunken discolored areas. In half of samples decay ranges from 26 to 30%, in remainder 8 to 18%, average 19% Bacterial Soft Rot in all stages.

6. Respondent has paid complainant \$3,404.95 but has failed to pay any part of the remaining \$3,805.55 which complainant claims is due and owing.

7. A formal complaint was filed on November 18, 1982, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent claims that the tomatoes were to be dropped off at two locations in Texas. It alleges that there were no problems with the first drop, for which it has paid complainant \$3,404.95, but claims that it is not liable for the balance of \$3,805.55, as the tomatoes were rejected at the second drop by its customer, Nicho Produce Co., Edinburg, Texas, because of severe decay. Respondent asserts that the truck driver resold the tomatoes and has not remitted any proceeds. Respondent denies any responsibility for the truck driver's action.

There can be no question but that respondent accepted the load, as respondent admits that a portion of the load was dropped off and accepted by one of its customers without objection. Acceptance of a portion of a load constitutes acceptance of an entire load, as such a commercial unit must be accepted or rejected in its entirety. 7 CFR 46.43(ii); *Salinas Lettuce Farmers Cooperative v. Larry Ober Co., Inc., or H. M. Shield, Inc.*, 39 Agric. Dec. 65 (1980).

Since respondent accepted the tomatoes, he became liable for the contract price, less damages due to any breach of warranty committed by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). In this f.o.b. sale, complainant gave an implied warranty of suitable shipping condition, which means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation conditions, will assure delivery without abnormal deterioration at the contract destination. 7 CFR 46.43(j). The June 29, 1982, inspection report indicates an average of 19% bacterial soft rot, which certainly constitutes abnormal deterioration. Although the inspection covered only 772 crates of tomatoes out of the 1,500 crates loaded on board the truck in South Carolina, if we were to assume that the remaining 728 crates were totally free from decay, the percentage of bacterial soft rot in the entire 1,500 crate load would still be about 10%, which is considered abnormal. Therefore, there was a breach of warranty by complainant. As damages for the breach of warranty, respondent is entitled to the difference, at the time and place of

acceptance, between the actual value of the tomatoes and their value if they had been as warranted. *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1208 (1982). However, respondent has not provided any evidence of the actual value of the tomatoes, claiming that the truck driver sold them. Although respondent denies any responsibility for this event, the law is clear that in an f.o.b. sale such as that involved here, the buyer bears the risk of loss once the goods have been properly turned over to the carrier. *Veg-A-Mix v. Pupillo Fruit Company*, 40 Agric. Dec. 1340 (1981). Without any evidence of the actual value of the tomatoes, we must conclude that respondent has failed to sustain his burden of proving damages. Therefore, respondent is liable for the entire contract price, less the amount already paid, or \$3,805.55. Respondent's failure to pay this amount to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,805.55, with interest thereon at the rate of 13% per annum from August 1, 1982, until paid.

AURA ORCHARDS, INC. v. C. H. ROBINSON COMPANY. PACA Docket No. 2-6332. Decided April 26, 1984.

Accord and Satisfaction—Dismissal.

Respondent and complainant entered agreement for the consignment of produce at a price that was not confirmed contractually. The produce was sold, and respondent submitted a check as payment in full to complainant who subsequently cashed the check, not knowing that it was intended as full settlement. Complainant alleges that the amount of the check did not represent the amount owed. Since respondent's check clearly indicated that it should be considered payment in full, and complainant cashed the check, the case is dismissed.

Steven M. Stolneck, Esquire, for complainant.
Owen Gleason, Esquire, for respondent.

George S. Whitten, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). Com-

plainant filed a timely complaint in which it seeks an award of reparation in the amount of \$7,678.80 in connection with the sale, through respondent acting as broker, of two truckloads of peaches in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying any liability to complainant.

The amount claimed as damages in the formal complaint does not exceed \$15,000, and accordingly the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Aura Orchards Inc., is a corporation whose address is R.F.D. #1, Box 352, Richwood Aura Road, Glassboro, New Jersey.

2. Respondent, C.H. Robinson Company, is a corporation whose address is 7525 Mitchell Road, Eden Prairie, Minnesota. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 25, 1982, and September 2, 1982, complainant entered into an agreement with respondent, who acted as a broker relative to the subject transactions, whereby respondent was to find a buyer for truckloads of peaches, U.S. No. 1, 2 1/4 inches and up. One truckload of such peaches was shipped on each of the above dates with respondent's office in St. Louis, Missouri, as the consignee. The peaches were billed with price open, although respondent had indicated to complainant that a net return of \$10, f.o.b., could be expected.

4. Respondent arranged the sale of each of the truckloads of peaches at a price which netted \$6.05 f.o.b. and remitted a total of \$12,267.60 to complainant on October 14, 1982. Later, on December 3, 1982, respondent remitted an additional \$700 to complainant due to an erroneous deduction of freight on the preceding check. On October 20, 1982, complainant filed an informal complaint with this Department seeking to have the \$6.05 price realized on both loads of peaches verified. On November 19, 1982, the Department noti-

fied respondent of complainant's informal complaint. On December 6, 1982, the Department received an additional letter from complainant alleging that the prices which respondent received for the peaches were far below the market price for such peaches.

5. On January 13, 1983, respondent sent complainant a check in the amount of \$33.60. Attached to this check was a stub which stated in relevant part as follows:

BALANCE DUE PACA—P-2215# THIS CHECK CONSTITUTES [sic] FULL ACCORD AND SATISFACTION OF ALL CLAIMS NOW EXISTING BETWEEN C. H. ROBINSON COMPANY AND AURA ORCHARDS RELATIVE TO PACA FILE P-2215.

This check was negotiated by complainant without protest.

6. The formal complaint was filed on April 12, 1983, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

In the formal complaint complainant alleges that, relative to the two truckloads of peaches, it entered into an agreement with respondent whereby:

under the terms of a consignment, the Respondent would negotiate a valid and binding contract for the sale of two separate truck loads of peaches, U.S. No. 1, 2¼ inches and up, said peaches being a perishable agricultural commodity, said sale to be at then current market sale price of the date of said transactions which was understood to be no less than [sic] the approximate price of the Complainant netting \$10 F.O.B. per 38 lb. crate, . . .

Later in the formal complaint the agreement was described in greater detail as follows:

Prior to the shipments as outlined above . . . , the Complainant and Respondent had numerous conversations concerning market value of peaches both from point of shipping in New Jersey, and in St. Louis, wherein Complainant in said conversations indicated to Respondent prior to shipment that the New Jersey market value of peaches was approximately \$12 per 38 lb. crate which would net complainant approximately \$10 per crate F.O.B., and based on said information Respondent represented and indicated that respondent would be able to obtain on Complainant's behalf a similar figure based on the St. Louis prices.

After conclusion of the subject transactions, and after respondent had forwarded payments to complainant based on a sale price of

\$6.05 per carton, complainant entered into a dispute with respondent contending that additional amounts were owed on the two transactions. While this dispute was ongoing respondent forwarded, through this Department, a check in the amount of \$33.60. Respondent's letter of Jan. 13, 1983, to the Department enclosing the check states in relevant part as follows:

In response to your telephone call, we are enclosing our check for \$33.60.

Please pass this along to Aura Orchards as payment in full for all claims between C.H. Robinson Company and Aura Orchards relative to PACA file P-2214 . . .

The Department forwarded the check to complainant along with its letter of January 18, 1983, which discussed the probable merits of complainant's claim. The only portion of the Department's letter which made any reference to the enclosed check stated:

Upon reviewing the file, it was discovered that a computational error of \$33.60 was made. Enclosed is C. H. Robinson's check #873737, in that amount.

Complainant contends that because of the Department's letter it thought the check was to settle a computation error and "had no knowledge or understanding that they intended this check to be in full settlement of the disputed amount." However, the check had attached to it a stub on which were typed in all-caps the words: "THIS CHECK CONSTITUTES [sic] FULL ACCORD AND SATISFACTION OF ALL CLAIMS NOW EXISTING BETWEEN C. H. ROBINSON COMPANY AND AURA ORCHARDS, RELATIVE TO PACA FILE T 2-2215." Although complainant contends forcefully that it did not intend to settle the issues between it and respondent by cashing the \$33.60 check, the record reveals that it did cash such check without protest. The wording on the check gave complainant full notice of the purpose for which the check was tendered, and complainant's cashing of the check amounted to acceptance of the terms under which it was offered. This case contains all of the classical elements of an accord and satisfaction, and in spite of complainant's subsequent protestations, we have no alternative but to hold that complainant's negotiation of the check constituted an accord and satisfaction between the parties. The complaint should be dismissed.

ORDER

The complaint is dismissed.

DOWNES, ROBERT H. AND SAUNDRA E. DOWNES v. PHILLIP R.
WELLER d/b/a RICHARD WELLER. PACA Docket No. 2-6382. De-
cided April 26, 1984.

Consent Decision

Complaint, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$8,757.71 against respondent in connection with transactions in interstate commerce involving shipments of potatoes. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Robert H. and Saundra E. Downes, is a partnership consisting of Robert H. Downes and Saundra E. Downes whose mailing address is Townsend, Virginia 23443. Respondent, Phillip R. Weller, is a individual d/b/a Richard Weller, whose mailing address is Box 313, Warehouse Point, Connecticut 06088. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that an involuntary petition in bankruptcy had been filed against respondent in the United States Bankruptcy Court, District of Connecticut, pursuant to the Bankruptcy Act (11 U.S.C. § 101 *et seq.*). A discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a petition under the Bankruptcy Code is filed. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 7 proceeding now pend-

ing in the United States Bankruptcy Court has been closed, dismissed, or that the debts have been discharged.

PARAMOUNT CITRUS ASSOCIATION INC. v. MARY F. SLOMA d/b/a NIAGARA TERMINAL PRODUCE. PACA Docket No. 2-6507. Decided April 26, 1984.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$761.25 in connection with 2 shipments of oranges and celery in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Paramount Citrus Association, Inc. is a corporation whose mailing address is P.O. Box 712, San Fernando, California 91361. Respondent, Mary F. Sloma, is a individual d/b/a Niagara Terminal Produce, whose mailing address is 160-162 Niagara Frontier Food Terminal, Buffalo, New York 14206. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$761.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$761.25, with interest thereon at the rate of 13 percent per annum from November 1, 1983, until paid.

GREEN VALLEY PRODUCE Co-Op v. MUTUAL PRODUCE, INC. PACA
Docket No. 2-6206. Decided April 27, 1984.

Thomas Oliveri, for complainant.
Alan L. Lewis, Esquire, for respondent.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,646.42 in connection with two transactions, in interstate commerce, involving shipments of lettuce, a perishable agricultural commodity.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant. Also, respondent filed a counterclaim against complainant in connection with the same two transactions in the amount of \$3,652. Complainant filed a reply thereto denying any liability to respondent.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleading of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, respondent an answering statement, and complainant also filed a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Green Valley Produce Coop, is a corporation whose mailing address is P. O. Box 2123, Salinas, California 93902.

2. Mutual Produce Inc., is a corporation whose mailing address is 48 New England Produce Center, Chelsea, Massachusetts 02150.

3. At all material times, both parties were licensed under the Act.

4. On or about April 27, 1982, in the course of interstate commerce, complainant and respondent entered into a contractual arrangement whereby a truckload of lettuce, containing 810 cartons, would be handled on a joint account basis. The contract between the parties was negotiated through the C. H. Robinson Company

office at 34 Market Street, Everett, Massachusetts 02149. On April 28, 1982, the broker issued a Brokers' Standard Memorandum of Sale on which it was indicated that the term of sale was f.o.b., and that the value of the lettuce was to be computed at a price of \$4 per carton, plus 65 cents per carton precooling, plus \$22.50 for a temperature recorder, for a total value of \$3,789. On April 29, 1982, the complainant issued an invoice to respondent which contained the above terms, and further indicated: "ALL SALES F.O.B. NO GRADE CONTRACT GOOD DELIVERY STANDARDS APPLY EXCLUDING BRUISING AND/OR DISCOLORATION FOLLOWING BRUISING." The lettuce was shipped on April 27, 1982, from Salinas, California to respondent's location in Chelsea, Massachusetts. It arrived on or about May 3, 1982, at which time it was the subject of a Federal inspection. The certificate issued relating to that inspection (No. E 075972) indicates that the condition of the lettuce was as follows:

Heads or portions of heads not effected by condition defects are fresh and crisp. WRAPPER LEAVES: average 1% decay. HEAD LEAVES: average 4% damage by discoloration following bruising. Average 2% serious damage by crushed heads. Average 7%, including 4% serious damage by brown discoloration occurring along midribs. Decay ranges 2 to 4 heads per carton, averages 14%. Bacterial Soft Rot in various stages.

Subsequent to this inspection, respondent notified the complainant that it was rejecting the load, and handled it for complainant's account. Such handling was without complainant's consent. On or about May 19, 1982, respondent issued an account of sale indicating that the lettuce was sold on May 3 and May 4, 1982, and that sale of the 810 cartons resulted in a return of \$5,091. Respondent charged the following expenses against that return: \$121.50 brokerage, \$32 Federal inspection, \$22.50 sampling, \$98 labor, \$10 terminal and delivery \$2900 freight, and \$610.92 commission. It reported net proceeds of \$1,296.08 to complainant and paid complainant that amount.

5. On or about April 29, 1982, in the course of interstate commerce, complainant and respondent entered into a joint account transaction involving 820 cartons of lettuce. The transaction was negotiated through the C. H. Robinson Company office at 34 Market Street, Everett, Massachusetts 02149. The broker, on April 30, 1982, issued a Brokers' Standard Memorandum of Sale indicating that the 820 cartons were to be handled on a joint account basis, with f.o.b. terms, and that they were to be valued at \$4.50 per carton, plus 65 cents per carton precooling, plus \$22.50 for a

temperature recorder, for a total agreed value of \$4,245.50. On May 4, 1982, the complainant issued an invoice to respondent reflecting the above-noted terms of sale and including the following proviso: "ALL SALES F.O.B. NO GRADE CONTRACT GOOD DELIVERY STANDARDS APPLY EXCLUDING BRUISING AND/OR DISCOLORATION FOLLOWING BRUISING." The load of lettuce arrived at respondent's location on or about May 6, 1982, where, at 9:10 a.m., it was the subject of a Federal inspection. The inspection certificate relating to that inspection (No. E 076055) indicates that the condition of the lettuce was as follows:

Heads or portions of heads not effected by condition defects are fresh and crisp. WRAPPER LEAVES: no decay. HEAD LEAVES: average 3% damage by bruising. Decay ranges from 1 to 9 heads per carton average 23% Bacterial Soft Rot in advanced stages.

On or about May 19, 1982, the respondent issued an account of sales which indicated that all the lettuce was sold on May 7, 1982, and that such sales returned a total of \$3,090. In addition, the respondent reported the following charges as costs against this total: \$123 for brokerage, \$246 for unloading and delivery, \$38 for a government inspection, \$98 labor, \$10 terminal and delivery charges, and \$2900 for freight. Respondent reported that this resulted in a deficit of \$325.

6. The formal complaint was filed on October 25, 1982, which was within the nine months after the cause of action herein accrued.

CONCLUSIONS

The crucial issue for determination in this case is whether the terms of the contract agreed to by the parties permitted the respondent to reject the two loads of lettuce upon delivery. It is the complainant's contention that the parties agreed to a straight joint account transaction and that the lettuce was not required to meet any particular standard upon delivery. From this, it argues that respondent had no right to reject the loads of lettuce. Respondent submits that although the transactions were joint account sales, the lettuce had to meet good delivery standards as defined in the Department's regulations. The Brokers' Standard Memorandum of Sale indicated that the terms of sale were f.o.b. The invoices issued by the complainant indicated that, while the terms were f.o.b. and good delivery standards applied, bruising and/or discoloration following bruising were excluded from the good delivery standards otherwise applicable. Those two documents are all of the evidence as to these agreements, save the parties sworn statements. This evidence indicates that respondent's allegations as to the terms of

Based on the above, since the deficit on the second shipment exceeds the amount due on the first shipment, we hold that the respondent is not further obligated to complainant. Accordingly, the complaint should be dismissed.

Respondent has counterclaimed for an amount in excess of that involved in its handling of the two subject shipments. However, the respondent's counterclaim consists of a claim for lost profits. Except in very special circumstances, not here applicable, such damages are not awardable in these proceedings. *Joseph A. Del Vecchio v. Battleground Farms*, 16 Agric. Dec. 1135 (1957). Accordingly the counterclaim is denied and should be dismissed.

ORDER

The complaint is dismissed.

The counterclaim is dismissed.

D'ARRIGO BROTHERS Co., of California v. PLAINVILLE PRODUCE.
PACA Docket No. 2-6297. Decided April 27, 1984.

Breach of warranty; failure to pay—Decision.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$1,312.50 in connection with the sale of a partial truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant filed an opening statement and a brief. Respondent elected not to file any additional evidence or a brief.

FINDINGS OF FACT

1. Complainant D'Arrigo Bros. Co. of California, is a corporation whose address is P.O. Box 850, Salinas, California.

2. Respondent, Plainville Produce, is an individual, Nicola Ruffini, whose address is 100 Reserve Road, Hartford, Connecticut. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately August 10, 1982, complainant sold to respondent, through a broker, Monte Brokerage Company, Inc., Nogales, Arizona, a partial truckload of lettuce consisting of 50 cartons of Green Head 24's, 50 cartons of Andy Boy 24's, and 150 cartons of Andy Boy 30's, for a total of \$1,312.50. The contract was made on an f.o.b. basis with good delivery standards to apply, excluding bruising or discoloration following bruising.

4. On August 10, 1982, the lettuce was loaded on board an ACB truck for shipment to respondent. Unknown to complainant, the truck, after leaving complainant's place of business, was further loaded with 180 plums, 120 peaches, 180 nectarines, 108 pears, 240 grapes, and 84 cantaloupes. The lettuce was shipped in interstate commerce to respondent, where it arrived and was accepted.

5. Upon arrival, the lettuce was subjected to a federal inspection on August 18, 1982, which revealed the following condition factors:

Each lot; Heads or portions of heads not affected by condition factors are fresh and crisp. Andy Boy 30 count lot; Wrapper leaves; No decay. Head leaves; From 28 to 29 heads per carton, average 96% damage, including 56% serious damage by russet spotting. From 1 to 2 heads per carton, average 4% decay, Bacterial Soft Rot in various stages. Andy Boy 24 count lot; Wrapper leaves; No decay. Head leaves; From 4 to 12 heads per carton, average 33% damage, including 14% serious damage, by russet spotting. Decay from 1 to 6 heads per carton, average 13% Bacterial Soft Rot in various stages. Green Head lot; Wrapper leaves; No decay. Head leaves; From 2 to 4 heads per carton, average 13% damage by tipburn. From 2 to 3 heads per carton, average 10% damage by russet spotting. Decay from 3 to 4 heads per carton, average 15%, Bacterial Soft Rot in various stages.

6. To date, respondent has failed to pay complainant any part of the contract price of \$1,312.50.

7. A formal complaint was filed on February 22, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Before addressing the merits of the case, we must first contend with respondent's claim that it did not receive a copy of the complaint. This is contradicted by a copy of a return-receipt card in the file, which states that the complaint was served upon respondent on April 15, 1983. The card is signed by a person professing to be the authorized agent of respondent, although the signature is unintelligible. It is clear from this card that the complaint was properly served upon respondent.

Turning to the merits of the case, respondent admits purchasing, receiving, and accepting the lettuce on an f.o.b. basis from complainant, but denies liability for any part of the contract price due to the alleged poor condition of the lettuce upon arrival, as shown by an August 18, 1982, inspection report. This inspection report shows severe damage due to russet spotting and decay. Since respondent accepted the lettuce, it became liable for the contract price, less damages due to any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). In this f.o.b. sale, complainant is held to have given an implied warranty of suitable shipping condition, which means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. 7 CFR 46.43(j). It is complainant's position that this warranty was not in effect here because of the existence of abnormal transportation conditions. Complainant claims in its informal complaint and opening statement that it was informed that the truck also contained plums, peaches, nectarines, pears, and cantaloupes, and asserts that these commodities emitted ethylene gas, resulting in severe russet spotting of the lettuce. In its answer, respondent agrees that there was a "mixed" load, but claims that the broker was responsible for adding the fruits, without respondent's knowledge or consent. However, the issue is not whether the broker or respondent is responsible, but only whether abnormal transportation conditions existed, thus voiding the warranty of suitable shipping condition.

In a recent case, *D'Arrigo Bros. Co. of California v. Colonial Stores and/or L & M Brokerage Co., Inc.*, 42 Agric. Dec. 173 (1983), we dealt with a similar situation involving the effect of ethylene gas on lettuce, allegedly causing russet spotting. In that case (at 176), we noted that the Department's publication, *Protecting Perishable Foods During Transport by Motor Truck*, Agriculture Hand-

book No. 105, stated as follows, concerning the subject of mixed loads:

Certain fruits and vegetables produce ethylene gas during respiration. Ethylene may bring about premature ripening, or it may damage carrots, lettuce, some kinds of flowers, and some nursery stock. Fruits and vegetables producing significant quantities of ethylene are apples, avocados, bananas, cantaloupes, honeydew melons, peaches, pears, plums, and tomatoes . . . Ethylene production is less pronounced at temperatures near freezing than at higher temperatures.

We also cited (at 176) another Departmental publication, *Market Diseases of Beets, Chickory, Endive, Escarole, Globe Artichokes, Lettuce, Rhubarb, Spinach, and Sweet Potatoes*, Agriculture Handbook No. 155, which states that one of the causal factors of russet spotting is ethylene emission in storage. In addition, complainant has introduced an article published by a non-governmental organization, The Produce Marketing Association, and written by R. F. Kasmire, Extension Vegetable Marketing Specialist, University of California, Davis, which includes peaches and nectarines among those commodities which should not be shipped with lettuce due to the danger of contamination by ethylene gas emissions. On the basis of this evidence, we conclude that the ethylene gas emitted by the plums, peaches, nectarines, pears and cantaloupes present in the truck containing the lettuce at issue caused the russet spotting exhibited by the lettuce upon its arrival at respondent's place of business. Therefore, abnormal transportation conditions were present. As a result of these abnormal transportation conditions, complainant's warranty of suitable shipping condition was not applicable to the russet spotting.

Regarding the decay found in the load, we note that the inspection occurred on August 18, 1982, which was eight days after shipment. This period of time is excessive for a truck shipment of lettuce from complainant's location in California to respondent in Connecticut, and could well have accounted for the decay present in the lettuce. Therefore, we conclude that the excessive shipping time also constituted abnormal transportation conditions, voiding the warranty of suitable shipping condition otherwise applicable with respect to the decay.

As respondent has not proved a breach of warranty, it is liable for the contract price of \$1,312.50. Respondent's failure to pay such sum to complainant and is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,312.50, with interest thereon at the rate of 13 percent per annum from September 1, 1982, until paid.

SID GOODMAN AND CO. INC. v. CRISPO AND SONS INC. a/t/a GREAT WESTERN SALES. PACA Docket No. 2-6347.

Stephen P. Mccarron, Esquire, for complainant.
Thomas Oliveri, for respondent.

Edward M. Silverstein, Presiding Officer.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,195.98 in connection with a transaction involving cantaloupes, a perishable agricultural commodity, in interstate commerce.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of sworn statements. Complainant submitted a sworn opening statement. Also, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Sid Goodman & Co., Inc., is a corporation whose mailing address is Maryland Wholesale Produce Market, Building A, Units 6-12, Jessup, Maryland 20794.

2. Respondent, Crispo & Sons, Inc., a/t/a Great Western Sales, is a corporation whose mailing address is 2350 West Shaw, Fresno,

California 93711. At all materials times, respondent was licensed under the Act.

3. On or about July 9, 1982, in the course of interstate commerce, complainant purchased a carload of cantaloupes from respondent as follows: 800 cartons "Sutton Place" cantaloupes, size 15, at an F.O.B. price of \$3.50 per carton (\$2,800), and 1,104 cartons "Sutton Place" cantaloupes, size 18, at an F.O.B. price of \$3.50 per carton (\$3,864), plus cooling at 70 cents per carton (\$1,332.80), palletization at 10 cents per carton (\$190.40), a temperature recorder at \$22.50, and 15 cents per carton for brokerage (\$285.60), for a total F.O.B. price of \$8,495.30. The complainant was granted protection on market decline. The transaction was brokered by the Farmers Potato Distributors Co., Inc., whose mailing address is P.O. Box 50008, Jacksonville Beach, Florida 32250. On July 14, 1982, the parties agreed to reduce the price on both sizes of cantaloupes to \$3.00 a crate, or a reduction in the total F.O.B. price to \$7,543.30. The broker confirmed this agreement in a memorandum to both parties which was dated July 19, 1982. Subsequently, complainant paid respondent the full contract price, or \$7,543.30, with respect to this shipment.

4. The cantaloupes were loaded on board car PFE 457461 on July 11, 1982. On the next day, the car began its movement toward the east coast. While the car was in-transit, the railroad took it off the route for two days. No reason was cited the record of this proceeding for this action. The tape from the temperature recorder on board the car indicates that the car temperature was maintained in a range of 33°F. to 40°F., except for a 20 hour period (hours 70-90) when the temperature ranged 42°F. to 44°F. On July 23, 1982, the car arrived at complainant's location. At 8:40 a.m. on that day, the cantaloupes on board the car were the subject of a Federal inspection. The inspector noted that the produce temperatures were 37°F. at the top, 40°F. at the bottom, and that the refrigeration unit was still operating. The condition of the cantaloupes was noted as follows: "Mostly firm, many ripe and firm. Ground color mostly yellow, some light green to turning yellow. Decay from 1 to 8 melons (6 to 53%) in most cartons, some none, average 16% *Cladosporium* Rot and *Fusarium* Rot in various stages affecting stem scar and sides of melons.

5. On July 23, 1982, the carload of cantaloupes was also the subject of a railroad inspection. The inspection certificate issued subsequent to that inspection reflects that the temperature of the cantaloupes was 37°F. both at the bottom and the top. It also noted the following as to the condition of the cantaloupes:

* * * Fairly well formed. Irregular sizing. Good to fair, few poor quality. Green to turning few well colored. Full to occasional partial slip, some melons with no slip. Clean. Firm to firm ripe, some ripe. Range 0 to 18 percent average 10% melons with radial growth cracks. Range 14 to 65% average 32% cladosporium in all stages at stem and fusarium affecting rinds only in all stages.

6. On July 27, 1982, at 7:00 a.m., 450 crates of the cantaloupes were the subject of a Federal inspection in complainant's cooler. The inspection certificate indicated that the temperature of the cantaloupes ranged from 48°F. to 53°F. It reported the condition of the cantaloupes as follows: "Mostly ripe and firm and mostly yellow, some light green to turning yellow ground color. Decay ranges from 1 to 15 melons (7 to 100%) per carton, average 38% Cladosporium Rot in various stages."

7. On July 29, 1982, the 800 cartons of size 15 cantaloupes were dumped. A dump certificate was issued which reflected that the temperature of the cantaloupes range from 45°F. to 68°F., and that the inspector "found the quality and/or condition" of the cantaloupes to be "generally decayed" and that it had "no commercial value at [the] time of [the] inspection."

8. The complainant prepared an account of sales which reflected that, during the period July 23 through July 27, 1982, it sold 1,091 crates of the size 18 cantaloupes for a total price of \$6,570.00. The account of sales also reflected the following expenses: \$10.00 for railroad inspection; \$32.00 each for two USDA inspections; \$19.00 for a dump certificate; \$25.00 for "entry"; \$95.00 as an unloading charge; freight charges of \$4,396.98; and a handling charge of 50 cents per crate for each of the 1,104 crates or \$952.00. The total expenses claimed by the complainant, including the \$7,543.30 paid to respondent, was \$13,105.28.

10. The formal complaint was filed on April 14, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The complainant in the instant case received a carload of cantaloupes from respondent and accepted them. According to the first Federal inspection and the railroad inspection, both of which took place on the date of receipt and acceptance of the cantaloupes (July 23, 1982), the cantaloupes failed to make good delivery upon arrival. See *Lindemann Farms, Inc. v. Sol Salins, Inc.*, 39 Agric. Dec. 1213, 1217 (1980): "No more than 5 percent of U.S. #1 cantaloupes can be affected by decay upon arrival in an F.O.B. contract, according to long established, accepted industry tolerance." The damage

on the cantaloupes which respondent shipped to complainant clearly exceeded this standard of acceptance.

Respondent claims in its defense that because of a two day transit delay caused by the railroad there was abnormal transportation, and that, therefore, its warranty of suitable shipping condition is voided. However, because the car was taken off route for two days by the railroad does not necessarily indicate that the total shipping time was thereby increased. The shipping time in the instant case was eleven days. The evidence submitted by complainant indicates that this time frame is not abnormal.* Respondent submitted no evidence to indicate that it was. Even if this time period were slightly abnormal, complainant's warranty of suitable shipping condition would not necessarily be voided. *Cleveland Celery Mkt. v. Vita-Wellbrock-Kearney*, 17 Agric. Dec. 768 (1958). In this regard, complainant submitted evidence in the form of a sworn statement from Dr. Raymond A. Cappellini, Chairman, Plant Pathology Department, Rutgers University, in which he concluded that after reviewing all of the documents relating to the instant shipment that

If these were good melons that were properly handled at shipping point, it is inconceivable that the time in transit or protective services could have caused the large amount of decay found upon arrival. Based on the evidence, I can only conclude that there was a problem with the melons at shipping point. However, based on the evidence I reviewed, I am unable to say precisely what that problem was at shipping point, e.g., lack of precooling or lengthy storage at high temperatures before shipment.

Based on all of the evidence, we conclude that the respondent breached its contract with complainant. The measure of damages for breach of warranty in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. *I. Kallish & Sons v. Jarosz Produce, Inc.*, 26 Agric. Dec. 1285 (1967); UCC Section 2-714. In the absence of other evidence, the delivered cost of the cantaloupes is accepted as representing the shipment's market value. *Brook Cumming Co. v. America Fruit*, 17 Agric. Dec. 43 (1958). As to the value of goods accepted, this may be evidenced by the proceeds obtained by the receiver on a prompt sale of such goods. *Kirby & Little Packing Co. v. ... Prod.*, 16 Agric. Dec. 1066 (1957). In computing the he complainant is not entitled to include within its

... Inc., v. Sol Salins, Inc., 42 Agric. Dec. 1181; ... aya for transit from California to Maryland was

expenses the cost of the inspections as such fees are not chargeable to the shipper, (*Hilvert v. California Produce*, 24 Agric. Dec. 1001 (1965)); and the handling charge which complainant failed to prove that it expended, (*D. M. Rothman Co. v. Peterson*, 18 Agric. Dec. 1294 (1959)). Thus, the value of the goods, if as warranted, would have been \$11,940.28, or the invoice cost of \$7,543.30 plus freight of \$4,396.98. The value of the goods actually received was \$6,509.26, or the value of the 1091 crates of cantaloupes which were sold (\$6,570), plus \$6.02, which is at the average selling price of each of the 1091 crates, for each of the 13 crates of melons unaccounted for by respondent (\$78.26), less expenses of \$139. Complainant's damages are thus \$5,431.02, or \$11,940.28 less \$6,509.26. On brief, complainant argues that the value of melons if as warranted would have equaled \$13,204. However, it has not submitted any evidence of this.

Based on the evidence submitted, we find that the respondent is obligated to complainant in the amount of \$5,431.02, and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant \$5,431.02 as reparation, plus interest at the rate of 13 percent per annum from September 1, 1982, until paid.

MISCELLANEOUS REPARATION ORDERS

GRIFFIN & BRAND OF MCALLEN INC. *v.* EVERETT W. GOLDEN III *d/b/*
a MEMPHIS PRODUCE EXCHANGE. PACA Docket No. 2-6216. De-
cided March 2, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON MOTION FOR RECONSIDERATION

A Decision and Order was issued in this proceeding on January 9, 1984. Respondent filed a letter with the Hearing Clerk on February 10, 1984, in which it objected to the Decision, and claimed there is an inspection certificate with respect to the transaction involved which would alter the outcome of the case. The letter has been treated as a Motion for Reconsideration. However, there was no inspection certificate placed in evidence. Since the time for taking new evidence has passed (see 7 CFR 47.24 (b)), there is no basis on which to reconsider the Decision and Order in this proceeding.

ORDER

The Motion for Reconsideration is denied.

Respondent shall pay to complainant the amount set forth in the Decision and Order within 30 days from the date of this Order.

TEXAS A&M UNIVERSITY-MOBILITZELK FARMS *v.* R FRUIT AND VEGE-
TABLE COMPANY. PACA Docket No. 2-6233. Decided March 2,
1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in connection with a transaction involving the shipment of perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 24, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

HUBERT GRAVES PACKING CO. INC. v. CRISAFULLI PACKING CO., and/
or INDIAN RIVER ROYAL CITRUS, INC. PACA Docket No. 2-6012.
Decided March 7, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). On October 19, 1983, the presiding officer in this case wrote to counsel for complainant informing him as follows:

Mr. Glenn Anderson, formerly counsel for Crisafulli Packing Co., has supplied us with certain documents filed before the State of Florida, Department of Agriculture Consumer Services. These documents consist of a brief filed by Mr. Anderson, a brief filed by your firm, a copy of a recommended order, and a copy of a final order. The documents indicate that appropriate service was made on your firm. It appears that from a review of the documents that a full hearing on the merits was had before the Florida Department of Agriculture which involved the same parties, and covered the same subject matter which is now before this forum in the subject cases. Apparently the Florida Department of Agriculture had full jurisdiction over the parties, and made a complete and final disposition of the matters before it. Accordingly, it would appear that the parties have made an election between the remedies made available to them and that we are precluded by section 5(b) of the Act (7 U.S.C. 499e(b)) and by the doctrine of *res judicata* from adjudicating these matters.

Complainant's counsel was given 15 days from the date of service of the presiding officer's letter in which to show cause why the complaint in this matter should not be dismissed for the reasons stated in the paragraph quoted above. Complainant's counsel made no reply to the presiding officer's letter and accordingly, the complaint herein is dismissed.

BELRIDGE PACKING CO. *v.* FIRST QUALITY FRUIT AND PRODUCE CO.,
INC. and/or C. H. ROBINSON CO. PACA Docket No. 2-6451. De-
cided March 7, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is granted 10 days from its receipt of this order in which to file an answer. If an answer is not timely filed, the default will be reinstated.

LESTER DISTRIBUTING COMPANY *v.* CENTRAL NEW YORK BANANA IM-
PORTERS, INC. PACA Docket No. 2-6460. Decided March 7, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A complaint was filed in which complainant seeks an award of against respondent in the amount of \$7,182 in connection with a transaction involving the shipment of mixed fruit, all of which are agricultural commodities, in interstate commerce. The formal complaint was served on respondent. By letter of February 17, 1984, complainant notified the Department of Agriculture that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of February 17, 1984, authorized dismissal of its complaint filed herein. Therefore, the complaint is hereby dismissed.

BUSHMANS INC., v. G&T TERMINAL PACKAGING Co. PACA Docket
No. 2-6094. Decided March 22, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DIRECTING SERVICE OF PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on December 8, 1983, awarding reparation to the complainant in the amount of \$3,270.

In response to respondent's motion, the Decision and Order was stayed on February 13, 1984, and respondent was given an opportunity to file a petition for reconsideration. Respondent filed its petition for reconsideration on February 24, 1984. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition.

NORDEN FRUIT Co. a/t/a CAL FRUIT v. D. J. FORRY Co. INC. PACA
Docket No. 2-6337. Decided March 22, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING REQUEST FOR STAY AND EXTENSION OF TIME TO FILE
PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on February 13, 1984, dismissing the complaint. By mailgram received March 5, 1984, complainant has moved that this matter be stayed and it be granted until March 26, 1984, to file a petition for reconsideration.

Section 47.24(a) of the Rules of Practice (7 CFR 47.24(a)) provides that a petition for reconsideration shall be filed within 10 days after the date of service of the Decision and Order. The Decision and Order was served upon complainant on February 16, 1984. Therefore, complainant's March 5, 1984, request for a stay and extension of time to file a petition for reconsideration is untimely and must be denied.

ACE TOMATO CO., INC. v. TRAY-WRAP INC. PACA Docket No. 2-6356.
Decided March 23, 1984.

Decision by Donald A. Campbell, Judicial Officer.

DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,024 in connection with a transaction, in interstate commerce, involving the shipment of tomatoes, a perishable agricultural commodity.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Ace Tomato Co., Inc., is a corporation whose mailing address is 2771 East French Camp Road, Manteca, California 95336.

2. Respondent, Tray-Wrap, Inc., is a corporation whose mailing address is 250 West 230th Street, Bronx, New York 10463. At all material times, respondent was licensed under the act.

3. On or about October 7, 1982, in the course of interstate commerce, complainant sold a carload of tomatoes to respondent as follows: 288 25 pound cartons of extra large tomatoes at an f.o.b. contract price of \$7.00 per carton and 1,224 25 pound cartons of large tomatoes at an agreed f.o.b. price of \$5.00 per carton, plus .15 cents per carton for palletization, and \$22.50 for a temperature recorder, for a total f.o.b. price of \$8,385.30. The tomatoes were shipped to respondent on October 11, 1982. They were received and accepted by respondent, which subsequently paid complainant \$8,385.30.

4. The formal complaint was filed on May 20, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The sole issue for determination in the instant case is whether the parties agreed to a contract price of \$7.00 and \$5.00 for the two sizes of tomatoes respectively, or \$9.00 and \$7.00 for those tomatoes. In these proceedings, the complainant has the burden of proving all of the material allegations of the complaint including the contract price. *R. L. Peed v. F & G*, 32 Agric. Dec. 285 (1973). The complainant alleges that the prices were \$9.00 and \$7.00 for the two sizes of tomatoes respectfully. In support thereof it submits the affidavits of two of its employees who claimed that the agreement was made on October 11, 1982, and that the market price at that time was \$9.00 and \$7.00 for the two subject sizes of tomatoes. Complainant has offered no other evidence to substantiate its allegations. Respondent counters these affidavits with an affidavit from its buyer who attests to the facts that the purchase was made on October 7, 1982, and that the market price at the time was \$7.00 and \$5.00 for the respective sizes of tomatoes. The buyer's statement, which was filed subsequent to the filing of the complainant's two statements, indicates that the buyer had reviewed complainant's two statements, and he stated that those statements were not accurate. Complainant did not respond to this specific allegation. The buyer's statement as to the tomatoes' market prices on October 7, 1982, is supported by the record.

We cannot conclude, based on the evidence submitted, that the complainant has carried its burden of proving all of the material allegations of the complaint including that the agreed contract prices were other than the prices which were admitted by respondent. Since we cannot so conclude, and since respondent has paid complainant this amount, the complaint should be dismissed.

ORDER

The complaint is dismissed.

EXETER PACKERS INC. v. PRIME-PAC INC. a/t/a J&S POTATO COMPANY and/or NETWORK BROKERAGE INC. PACA Docket No. 2-6444. Decided March 24, 1984.

Decision by Donald A. Campbell, Judicial Officer

VACATED AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

formal complaint was filed on April 4, 1983, in which complainant sought reparation of \$14,332.45 against respondents in connection with 4 transactions involving tomatoes in interstate commerce. Inasmuch as the complaint failed to state a cause of action against respondent Network Brokerage, Inc., and respondent Prime-Pac, Inc. failed to file a timely answer, an Order was issued, on September 1, 1983, dismissing the complaint against Network Brokerage and ordering Prime-Pac to pay complainant \$14,332.45, as reparation, plus interest at the rate of 13% per annum from November 1, 1982, until paid. Subsequent to receipt of Prime-Pac's motion to reopen, this order was stayed on October 6, 1983. By order dated December 16, 1983, an Order Reopening After Default was issued. In that Order, Prime-Pac was given 10 days from service thereof to file an answer to the complaint, and notified that a failure to do so would result in the reissuance of the Default Order. Although the Order was served on Prime-Pac on December 20, 1983, it has not filed an answer. Accordingly, the Order Reopening after Default is vacated, and the Default Order of September 1, 1983, is reinstated except that Prime-Pac shall have thirty days from service of this order to pay complainant the reparation awarded therein.

VERO CITRUS SALES INC. v. CRISAFULLI PACKING CO., and/or INDIAN RIVER ROYAL CITRUS, INC. PACA Docket No. 2-6013. Decided April 3, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). On October 19, 1983, the presiding officer in this case wrote to counsel for complainant informing him as follows:

Mr. Glenn Anderson, formerly counsel for Crisafulli Packing Co., has supplied us with certain documents filed before the State of Florida, Department of Agriculture Consumer Services. These documents consist of a brief filed by Mr. Anderson, a brief filed by your firm, a copy of a recommended order, and a copy of a final order. The documents indicate that appropriate service was made on your firm. It appears that from a review of the documents that a full hearing on the merits was had before the Florida Department of Agriculture which involved the same parties, and covered the same subject matter which is now before this forum in the subject cases. Apparently the

complainant. By mailgram dated March 1, 1984, and received on March 5, 1984, complainant moved that the Decision and Order be stayed pending receipt of its petition for reconsideration. This motion was denied by order dated March 22, 1984. On April 19, 1984, complainant's representative's April 11, 1984, letter was received. Said letter is, in essence, a renewed motion for a stay pending receipt of complainant's petition for reconsideration. Because of the issues raised therein, the February 13, 1984, Decision and Order is stayed pending a determination on whether complainant shall be allowed to file for reconsideration.

NORTH COUNTY FRUIT SALES INC v. BOB PRICE ASSOCIATES INC.
PACA Docket No. 2-6140. Decided April 27, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$23,802 in connection with 2 transactions involving the shipment of avocados, a perishable agricultural commodity, in foreign commerce.

A copy of the formal complaint was served on respondent. By letter dated March 22, 1984, complainant notified the Department that it was withdrawing its complaint. Complainant, in its letter of March 22, 1984, authorized dismissal of its complaint filed herein. Accordingly, the complaint is hereby dismissed.

RITCLO PRODUCE INC. v. JOHN LIVACICH PRODUCE INC. and/or LARRY
ELMER INC. PACA Docket No. 2-6476. Decided April 27, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A complaint was filed in which complainant seeks reparation against respondents, jointly and severally, in connection with transactions in interstate commerce involving shipment

of tomatoes. A copy of the formal complaint was served upon respondents, and respondents have filed an answer thereto.

Complainant, Ritelo Produce Inc., is a corporation whose address is P.O. Box 794, Nogales, Arizona. Respondent, John Livacich Produce Inc., is a corporation whose address is P.O. Box 5519, San Bernardino, California. Respondent, Larry Elmer Inc., is a corporation whose address is P.O. Box 45586, Los Angeles, California. Respondents were licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent Larry Elmer Inc. had filed in the United States Bankruptcy Court, Los Angeles, California, on January 31, 1984, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding against Larry Elmer Inc. only is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

This order has no effect on this proceeding with respect to respondent John Livacich Produce Inc.

FRANKS DISTRIBUTING INC. v. FOOD SERVICE INDUSTRIES INC. a/t/a
EASTERN PACIFIC PICKLE CO. PACA Docket No. 2-6148.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF CONTINUANCE

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$21,588.15 against respondent in connection with transactions in interstate commerce involving shipments of cucumbers. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Frank's Distributing, Inc., is a corporation whose address is Rio Rico Industrial Park, P.O. Box 518, Nogales, Arizona. Respondent, Food Service Industries, Inc. a/t/a Eastern Pacific Pickle Co., is a corporation whose address is 1319 Mono Street, Los Angeles, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Los Angeles, California, Case Number LA-84-00739-RM, on January 20, 1984, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL,
JUDICIAL OFFICER

ACTION PRODUCE *v.* JAMES E. CAMPBELL AND J. C. WATTS d/b/a WATTS PRODUCE CO. PACA Docket No. RD-84-192. Decided April 2, 1984.

Respondent was ordered to pay complainant, as reparation, \$5,004.75, plus 13 percent interest per annum from August 1, 1983, until paid.

ALAMO PACKING COMPANY *v.* DAN GARCIA BROKERAGE, INC. PACA Docket No. RD-84-135. Decided March 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$40,213.44, plus 13 percent interest per annum from March 1, 1983, until paid.

AL HARRISON COMPANY DISTRIBUTORS a/t/a HARRISON MELON CO. OF ARIZONA *v.* ASSOCIATED FOOD SERVICE INC. d/b/a ASSOCIATED ROMNEY FOOD SERVICE. PACA Docket No. RD-84-167. Decided March 26, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,686.20, plus 13 percent interest per annum from September 1, 1983, until paid.

A.T.B. DISTRIBUTING CO. *v.* MACDONALD IMPORT CO., INC. PACA Docket No. RD-84-144. Decided March 14, 1984.

Respondent was ordered to pay complainant, as reparation, \$999.00, plus 13 percent interest per annum from September 1, 1983, until paid.

B & A FARMS *v.* CENTRAL WV WHOLESALE PRODUCE INC. PACA Docket No. RD-84-209. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,660.00, plus 13 percent interest per annum from August 1, 1983, until paid.

BATTAGLIA PRODUCE SALES, INC. *v.* MOUNTAIN PRODUCE SALES, INC. PACA Docket No. RD-84-163. Decided March 21, 1984.

Respondent was ordered to pay complainant, as reparation, \$5,080.00, plus 13 percent interest per annum from October 1, 1983, until paid.

BEST PRODUCE DISTRIBUTING *v.* MACDONALD IMPORT CO. INC. PACA Docket No. RD-84-240. Decided April 23, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,984.35, plus 13 percent interest per annum from October 1, 1983, until paid.

BIG RED TOMATO PACKERS *v.* ROBERT TROVER. PACA Docket No. RD-84-226. Decided April 16, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,985.65, plus 13 percent interest per annum from March 1, 1983, until paid.

BOWLIN & SON INC. *v.* HOLLY PRODUCE CO. INC. PACA Docket No. RD-84-212. Decided April 11, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,590.99, plus 13 percent interest per annum from August 1, 1983, until paid.

COTURE FARMS *v.* FRESH WORLD INC. PACA Docket No. RD-84-188. Decided April 2, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,740.00, plus 13 percent interest per annum from September 1, 1983, until paid.

CAAMANO BROS. INC. *v.* LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-246. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,742.39, plus 13 percent interest per annum from July 1, 1983, until paid.

CAL-SHRED INC. *a/t/a* STRAWBERRY CITY SALES *v.* GARDEN PRODUCTS INC. PACA Docket No. RD-84-222. Decided April 16, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,122.25, plus 13 percent interest per annum from August 1, 1983, until paid.

CHASE FARMS INC. *v.* VIP PRODUCE. PACA Docket No. RD-84-221. Decided April 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$14,129.50, plus 13 percent interest per annum from June 1, 1983, until paid.

COUNTY VEGETABLE PACKERS INC. *v.* PHIL JOHNSON. PACA Docket No. RD-84-230. Decided April 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,100.00, plus 13 percent interest per annum from August 1, 1983, until paid.

DELAWARE PRODUCE GROWERS INC. *v.* INSTITUTIONAL FOOD PRODUCTS INC. PACA Docket No. RD-84-219. Decided April 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,412.73, plus 13 percent interest per annum from September 1, 1983, until paid.

DEL MONTE BANANA COMPANY *v.* SAMUEL CAROLLO & SONS, INC. PACA Docket No. RD-84-227. Decided April 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,048.25, plus 13 percent interest per annum from August 1, 1983, until paid.

DOMINIC PALAZZOLO *v.* GILARDI TRUCK & TRANSPORTATION INC. a/t/a A.M. GILARDI & SONS. PACA Docket No. RD-84-249. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,631.00, plus 13 percent interest per annum from January 1, 1983, until paid.

DELAWARE PRODUCE GROWERS INC. *v.* L.C. INTERNATIONAL CO. PACA Docket No. RD-84-178. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,992.00, plus 13 percent interest per annum from September 1, 1983, until paid.

ECKEL, FRANK S. III AND THE PRODUCE CENTER INC. d/b/a SKIP'S CONSOLIDATION *v.* SAM WANG FOOD CORP. PACA Docket No. RD-84-186. Decided March 30, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,213.70, plus 13 percent interest per annum from March 30, 1984, until paid.

FRANK J. BALESTRIERI COMPANY *v.* INTERNATIONAL FINE FOODS INC. formerly: CHOY FOOD CORP. PACA Docket No. RD-84-181. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$325.50, plus 13 percent interest per annum from December 1, 1982, until paid.

FRANK CAPURRO & SON *v.* TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-137. Decided March 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$11,731.10, plus 13 percent interest per annum from October 1, 1983, until paid.

FRUDDEN PRODUCE INC. *v.* McDONALD'S TOMATOES, INC. PACA Docket No. RD-84-159. Decided March 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$15,111.00, plus 13 percent interest per annum from November 1, 1983, until paid.

GEM STATE SALES INC. *v.* TUCKER PRODUCE Co. a/t/a TUCKER'S FARMERS MARKET. PACA Docket No. RD-84-233. Decided April 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$4,750.00, plus 13 percent interest per annum from December 1, 1982, until paid.

GENERAL PRODUCE CO. *v.* TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-200. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,165.38, plus 13 percent interest per annum from December 1, 1983, until paid.

GENEVA COUNTY GROWERS INC. *v.* FAIN PRODUCE CORPORATION. PACA Docket No. RD-84-173. Decided March 27, 1984.

Respondent was ordered to pay complainant, as reparation, \$13,032.00, plus 13 percent interest per annum from August 1, 1983, until paid.

DELAWARE PRODUCE GROWERS INC. *v.* L.C. INTERNATIONAL CO. PACA Docket No. RD-84-208. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$907.50, plus 13 percent interest per annum from July 1, 1983, until paid.

GERALD E. MANN *v.* LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-248. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$72,493.28, plus 13 percent interest per annum from August 1, 1983, until paid.

GOLD COAST PACKING INC. v. GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-197. Decided April 4, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,822.10, plus 13 percent interest per annum from May 1, 1983, until paid.

GRATZ & UTTER v. INTERNATIONAL FINE FOODS, INC. formerly: CHOY FOOD CORP. PACA Docket No. RD-84-210. Decided April 11, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,652.43, plus 13 percent interest per annum from November 1, 1983, until paid.

GREEN VALLEY PRODUCE COOPERATIVE v. MARY F. SLOMA d/b/a NIAGARA TERMINAL PRODUCE. PACA Docket No. 2-6506. Decided April 25, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,571.72, plus 13 percent interest per annum from December 1, 1983, until paid.

GRENNBELT FARMS INC. v. GOLD TOWER INC. PACA Docket No. RD-84-198. Decided April 2, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,400.90, plus 13 percent interest per annum from September 1, 1983, until paid.

GRIFFIN-HOLOER Co. v. WATTS PRODUCE. PACA Docket No. RD-84-205. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,200.00, plus 13 percent interest per annum from December 1, 1983, until paid.

GRIFFIN-HOLOER Co. v. MOUNTAIN PRODUCE SALES INC. PACA Docket No. RD-84-202. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,828.75, plus 13 percent interest per annum from November 1, 1983, until paid.

GROWERS DISTRIBUTING COMPANY. v. MERIT INTERNATIONAL CORPORATION. PACA Docket No. RD-84-228. Decided April 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$10,542.00, plus 13 percent interest per annum from August 1, 1983, until paid.

GROWERS DISTRIBUTING COMPANY *v.* FRESH WORLD INC. PACA Docket No. RD-84-239. Decided April 23, 1984.

Respondent was ordered to pay complainant, as reparation, \$19,926.22, plus 13 percent interest per annum from September 1, 1983, until paid.

GRO-WEST INC. *v.* FRESH WORLD INC. PACA Docket No. RD-84-193. Decided April 4, 1984.

Respondent was ordered to pay complainant, as reparation, \$31,830.10, plus 13 percent interest per annum from September 1, 1983, until paid.

GWIN, WHITE AND PRINCE, INC. *v.* HANI NAEMI d/b/a GREEN ACRES PRODUCE CO. PACA Docket No. RD-84-142. Decided March 14, 1984.

Respondent was ordered to pay complainant, as reparation, \$11,017.00, plus 13 percent interest per annum from August 1, 1983, until paid.

HAGINS, WILLIAM L. AND ANITA S. HAGINS d/b/a PAJARO VALLEY FRESH FRUIT & VEGETABLE DISTRIBUTING *v.* GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-196. Decided April 4, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,910.00, plus 13 percent interest per annum from October 1, 1983, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INC. *v.* BIG CHIEF TOMATO AND PRODUCE INC. PACA Docket No. RD-84-169. Decided March 26, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,449.00, plus 13 percent interest per annum from October 1, 1983, until paid.

HAYWOOD COUNTY COOPERATIVE FRUIT AND VEGETABLE ASSOCIATION INC. *v.* MOUNTAIN PRODUCE SALES. PACA Docket No. RD-84-162. Decided March 21, 1984.

Respondent was ordered to pay complainant, as reparation, 3,521.25, plus 13 percent interest per annum from September 1, 1983, until paid.

IELMS POTATO CO. *v.* ROMNEY PRODUCE COMPANY. PACA Docket No. RD-84-149. Decided March 15, 1984.

Respondent was ordered to pay complainant, as reparation, 49,481.50, plus 13 percent interest per annum from August 1, 1983, until paid.

HENRY J. ESCHER, K.D.N. ENTERPRISES INC. AND DONALD W. MOORE */b/a* J-B DISTRIBUTING CO. *v.* WESTERN BEST PACKING CO. PACA Docket No. RD-84-206. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, 13,845.00, plus 13 percent interest per annum from October 1, 1983, until paid.

L. HALL & CO. INC. *v.* FRESH WORLD INC. PACA Docket No. RD-84-58. Decided March 20, 1984.

Respondent was ordered to pay complainant, as reparation, 10,975.90, plus 13 percent interest per annum from September 1, 1983, until paid.

LUDIS PRODUCE CO. INC. *v.* A. LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-231. Decided April 19, 1984.

Respondent was ordered to pay complainant, as reparation, 6,728.45, plus 13 percent interest per annum from June 1, 1983, until paid.

LUIGI E. SANDOW *v.* CONQUEST PRODUCE INC. PACA Docket No. RD-84-217. Decided April 12, 1984.

Respondent was ordered to pay complainant, as reparation, 12,472.25, plus 13 percent interest per annum from May 1, 1983, until paid.

& J PRODUCE CO. *v.* CENTRAL GROCERS COOPERATIVE, INC. PACA Docket No. RD-84-166. Decided March 26, 1984.

Respondent was ordered to pay complainant, as reparation, 4,200.00, plus 13 percent interest per annum from October 1, 1983, until paid.

R. BROOKS & SON INC. *v.* JOSE F. TAVERAS *d/b/a* TAVERAS TROPICAL FRUIT. PACA Docket No. RD-84-211. Decided April 11, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,100.00, plus 13 percent interest per annum from December 1, 1982, until paid.

J.S. McMANUS PRODUCE CO. INC. *v.* WATTS PRODUCE CO. PACA Docket No. RD-84-162. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$5,329.10, plus 13 percent interest per annum from July 1, 1983, until paid.

JERRY TALLEY CO. INC. *v.* FRED FREGO d/b/a FARM FRESH PRODUCE. PACA Docket No. RD-84-213. Decided April 11, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,796.34, plus 13 percent interest per annum from August 1, 1982, until paid.

JOE PHILLIPS & ASSOCIATES, INC. *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-185. Decided March 30, 1984.

Respondent was ordered to pay complainant, as reparation, \$34,321.70, plus 13 percent interest per annum from September 1, 1983, until paid.

JOHN F. SCHOENY CO. a/t/a SCHONEY INSTITUTIONAL FOODS *v.* CHICAGO PRODUCE SUPPLIERS INC. PACA Docket No. RD-84-139. Decided March 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$5,159.25, plus 13 percent interest per annum from June 1, 1983, until paid.

KERN RIDGE GROWERS INC. *v.* FRESH WORLD INC. PACA Docket No. RD-84-231. Decided April 2, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,335.00, plus 13 percent interest per annum from August 1, 1983, until paid.

KERN RIDGE GROWERS INC. *v.* MACDONALD IMPORT Co., INC. PACA Docket No. RD-84-152. Decided March 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$933.75, plus 13 percent interest per annum from September 1, 1983, until paid.

K. M. DAVIES CO. INC. *v.* JERRY BLOOR & SON INC. PACA Docket No. RD-84-218. Decided April 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,506.70, plus 13 percent interest per annum from March 1, 1983, until paid.

KUEHNLEIN, JERRY E. AND CARL A. BLANK d/b/a B & K FARM PRODUCE *v.* HILLE FARMS, INC. PACA Docket No. RD-84-165. Decided March 21, 1984.

Respondent was ordered to pay complainant, as reparation, \$25,492.27, plus 13 percent interest per annum from October 1, 1983, until paid.

LAMB FRUIT CO. INC. *v.* SEBASTIAN FOOD DISTRIBUTORS. PACA Docket No. RD-84-234. Decided April 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,356.00, plus 13 percent interest per annum from November 1, 1983, until paid.

LINDEMANN FARMS INC. *v.* WESTERN BEST PACKING CO. PACA Docket No. RD-84-207. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$37,388.70, plus 13 percent interest per annum from November 1, 1983, until paid.

LITTLE ROCK PRODUCE COMPANY INC. *v.* LARRY WATKINS d/b/a NORTHLAKE PRODUCE. PACA Docket No. RD-84-183. Decided March 30, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,027.00, plus 13 percent interest per annum from November 1, 1983, until paid.

J.R. HAMILTON INC. *v.* REYNALDO R. MONTES d/b/a MONTES PRODUCE. PACA Docket No. RD-84-242. Decided April 23, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,521.20, plus 13 percent interest per annum from July 1, 1983, until paid.

LORENZO PRODUCE INC. *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-146. Decided March 14, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,850.00, plus 13 percent interest per annum from October 1, 1983, until paid.

LYNN JOSEPHSON PRODUCE INC. *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-195. Decided April 4, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,488.75, plus 13 percent interest per annum from December 1, 1983, until paid.

MACCHIAROLI, JAMES d/b/a JAMES MACCHIAROLI FRUIT CO. *v.* ELITE PRODUCE BROKERAGE INC. PACA Docket No. RD-84-141. Decided March 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,552.40, plus 13 percent interest per annum from June 1, 1983, until paid.

MAINE FARMERS EXCHANGE *v.* EASTERN PRODUCE CO. INC. PACA Docket No. RD-84-180. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,111.10, plus 13 percent interest per annum from April 1, 1983, until paid.

MANA-HILL PACKING CO. INC. *v.* TUCKER FARMS. PACA Docket No. RD-84-177. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,352.00, plus 13 percent interest per annum from July 1, 1983, until paid.

MANNY LAWRENCE CO. INC. *v.* A. LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-244. Decided April 23, 1984.

Respondent was ordered to pay complainant, as reparation, \$21,705.00, plus 13 percent interest per annum from September 1, 1983, until paid.

MERIT PACKING COMPANY *v.* MACDONALD IMPORT, Co., INC. PACA Docket No. RD-84-148. Decided March 14, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,989.00, plus 13 percent interest per annum from October 1, 1983, until paid.

MERRILL FARMS *v.* GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-199. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,147.50, plus 13 percent interest per annum from January 1, 1984, until paid.

MILLS DISTRIBUTING COMPANY *v.* MacDonald Import Co., Inc. PACA Docket No. RD-84-147. Decided March 14, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,996.00, plus 13 percent interest per annum from September 1, 1983, until paid.

MILLS DISTRIBUTING COMPANY *v.* GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-150. Decided March 15, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,144.45, plus 13 percent interest per annum from November 1, 1983, until paid.

MORT BROWN, INC. *v.* ETHEL R. BACHMAN AND ALBERT L. BACHMAN d/b/a A.L. BACHMAN PRODUCE CO. PACA Docket No. RD-84-255. Decided April 16, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,677.50, plus 13 percent interest per annum from August 1, 1983, until paid.

MOUNTAIN PRIDE APPLES, INC. *v.* MOUNTAIN PRODUCE SALES, INC. PACA Docket No. RD-84-201. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,074.00, plus 13 percent interest per annum from September 1, 1983, until paid.

MURPHY TOMATO CO. INC. *v.* HOLLY PRODUCE CO. INC. PACA Docket No. RD-84-182. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$7,400.00, plus 13 percent interest per annum from October 1, 1983, until paid.

NASH-DECAMP COMPANY *v.* JOHN R. MONTES d/b/a MIRAMAR FARM SALES. PACA Docket No. RD-84-179. Decided March 28, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,003.00, plus 13 percent interest per annum from September 1, 1983, until paid.

NOGALES PRODUCE INC. *v.* RIVERA PRODUCE Co. INC. PACA Docket No. RD-84-143. Decided March 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,246.10, plus 13 percent interest per annum from June 1, 1983, until paid.

NORTH STATE APPLE ORCHARDS *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-194. Decided April 4, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,578.15, plus 13 percent interest per annum from December 1, 1984, until paid.

O & E GROWERS, INC. *v.* MOUNTAIN PRODUCE SALES, INC. PACA Docket No. RD-84-161. Decided March 21, 1984.

Respondent was ordered to pay complainant, as reparation, \$14,616.25, plus 13 percent interest per annum from May 1, 1983, until paid.

O. P. MURPHY PRODUCE COMPANY INC. *a/t/a* O. P. MURPHY & SONS *v.* R. A. CANALES PRODUCE. PACA Docket No. RD-84-250. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,156.00, plus 13 percent interest per annum from October 1, 1983, until paid.

OWENS, HAYES JR. *v.* WINSTON C. BAILEY *d/b/a* CLAUDE BAILEY PRODUCE Co. PACA Docket No. RD-84-136. Decided March 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,258.50, plus 13 percent interest per annum from October 1, 1983, until paid.

PAM PAK DISTRIBUTORS, INC. *v.* GEORGE J. HUTCHISON AND FRANCES L. TOLMAN *d/b/a* TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-151. Decided March 15, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,726.90, plus 13 percent interest per annum from August 1, 1983, until paid.

PARAMOUNT CITRUS ASSOCIATION INC. *v.* FRESH WORLD INC. PACA Docket No. RD-84-157. Decided March 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,995.00, plus 13 percent interest per annum from September 1, 1983, until paid.

PARAMOUNT CITRUS ASSOCIATION INC. v. MARY F. SLOMA d/b/a NI-AGARA TERMINAL PRODUCE. PACA Docket No. 2-6507. Decided April 26, 1984.

Respondent was ordered to pay complainant, as reparation, \$761.25, plus 13 percent interest per annum from November 1, 1983, until paid.

PEREZ PACKING INC. v. MACDONALD IMPORT CO. INC. PACA Docket No. RD-84-168. Decided March 26, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,911.00, plus 13 percent interest per annum from September 1, 1983, until paid.

POTATO SERVICES OF MICHIGAN INC. v. SAM PUGH & SON INC. PACA Docket No. RD-84-172. Decided March 27, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,386.32, plus 13 percent interest per annum from October 1, 1983, until paid.

R. H. McCLOSKEY & SON a/d/a VEG-ACRES FARM AND GARDEN-HOUSES v. CLARENCE MILLER Co. INC. PACA Docket No. RD-84-145. Decided March 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$27,719.36, plus 13 percent interest per annum from October 1, 1983, until paid.

REYNOLDS PACKING COMPANY a/t/a M & R COMPANY v. FRESH WORLD INC. PACA Docket No. RD-84-156. Decided March 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$26,536.40, plus 13 percent interest per annum from September 1, 1983, until paid.

RICHLAND SALES Co. v. MACDONALD IMPORT CO. INC. PACA Docket No. RD-84-153. Decided March 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,128.60, plus 13 percent interest per annum from September 1, 1983, until paid.

RITCLO PRODUCE INC. *v.* G.A.B. PRODUCE INC. PACA Docket No. RD-84-134. Decided March 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$16,728.60, plus 13 percent interest per annum from May 1, 1983, until paid.

RITCLO PRODUCE INC. *v.* JOHN R. MONTES d/b/a MIRAMAR FARM SALES. PACA Docket No. RD-84-138. Decided March 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$43,047.60, plus 13 percent interest per annum from April 1, 1983, until paid.

ROBERT L. MEYER d/b/a MEYER TOMATOES *v.* JOHN R. MONTES d/b/a MIRAMAR FARM SALES. PACA Docket No. RD-84-241. Decided April 23, 1984.

Respondent was ordered to pay complainant, as reparation, \$10,577.96, plus 13 percent interest per annum from July 1, 1983, until paid.

ROLLAND JONES PRODUCE INC. *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-235. Decided April 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$9,370.00, plus 13 percent interest per annum from December 1, 1983, until paid.

ROGER HARLOFF PACKING INC. *v.* DOYLE W. KEY d/b/a DOYLE KEY PRODUCE. PACA Docket No. RD-84-224. Decided April 16, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,045.60, plus 13 percent interest per annum from July 1, 1983, until paid.

S. STAMOULES, INC. *v.* MACDONALD IMPORT CO., INC. PACA Docket No. RD-84-155. Decided March 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$834.60, plus 13 percent interest per annum from September 1, 1983, until paid.

SAN BERNARDINO PRODUCE TRANSPORT INC. a/t/a PANDA PRODUCE *v.* MACDONALD IMPORT CO., INC. PACA Docket No. RD-84-154. Decided March 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$4,651.25, plus 13 percent interest per annum from September 1, 1983, until paid.

SANTO TOMAS PRODUCE ASSOCIATION *v.* SEBASTIAN FOOD DISTRIBUTORS, INC. PACA Docket No. RD-84-236. Decided April 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$4,040.00, plus 13 percent interest per annum from November 1, 1983, until paid.

SEABOARD PRODUCE DISTRIBUTORS, INC. *v.* JOHN R. MONTES d/b/a MIRAMAR FARM SALES. PACA Docket No. RD-84-215. Decided April 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$6,612.20, plus 13 percent interest per annum from November 1, 1983, until paid.

SIX L's PACKING COMPANY, INC. *v.* MACDONALD'S TOMATOES, INC. PACA Docket No. RD-84-160. Decided March 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$19,651.60, plus 13 percent interest per annum from December 1, 1983, until paid.

SIX L's PACKING COMPANY INC. *v.* ROCKY PONTINO. PACA Docket No. RD-84-171. Decided March 27, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,973.60 plus 13 percent interest per annum from August 1, 1983, until paid.

STANLEY BROS. INC. *v.* R & M PRODUCE. PACA Docket No. RD-84-140. Decided March 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,722.50, plus 13 percent interest per annum from May 1, 1983, until paid.

STEPHEN PAVICH & SONS *v.* A. LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-245. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$39,493.20, plus 13 percent interest per annum from September 1, 1983, until paid.

STEVCO INC. *v.* KLEIMAN & HOCHBERG INC. PACA Docket No. RD-84-220. Decided April 13, 1984.

Respondent was ordered to pay complainant, as reparation, \$5,694.66, plus 13 percent interest per annum from August 1, 1983, until paid.

SUCASA PRODUCE INC. *v.* McDONALD'S TOMATOES INC. PACA Docket No. RD-84-184. Decided March 30, 1984.

Respondent was ordered to pay complainant, as reparation, \$8,607.40, plus 13 percent interest per annum from June 1, 1983, until paid.

SUMMIT ENTERPRISES INC. *a/t/a* COOK SALES COMPANY *v.* J.C. WATTS AND JAMES E. CAMPBELL *d/b/a* WATTS PRODUCE CO. PACA Docket No. RD-84-204. Decided April 6, 1984.

Respondent was ordered to pay complainant, as reparation, \$3,979.90, plus 13 percent interest per annum from September 1, 1983, until paid.

S. STAMOULES INC. *a/t/a* STAMOULES PRODUCE CO. *v.* FRESH WORLD INC. PACA Docket No. RD-84-189. Decided April 2, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,250.40, plus 13 percent interest per annum from October 1, 1983, until paid.

SUNNYSIDE PACKING COMPANY *v.* A. LEVANTINO 'PRODUCE CORP. PACA Docket No. RD-84-247. Decided April 24, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,814.50, plus 13 percent interest per annum from August 1, 1983, until paid.

SUNSHINE PACKING HOUSE INC. *v.* GUSTAVO RUIZ *d/b/a* GIANT CITRUS CO. PACA Docket No. RD-84-223. Decided April 16, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,650.00, plus 13 percent interest per annum from June 1, 1983, until paid.

SUNSHINE PACKING HOUSE, INC. *v.* R & M PRODUCE. PACA Docket No. RD-84-187. Decided March 30, 1984.

Respondent was ordered to pay complainant, as reparation, \$27.30, plus 13 percent interest per annum from December 1, until paid.

SUN WORLD INTERNATIONAL INC. *v.* EUSTACE A. HAWTHORNE AND AL L. MICHELSON d/b/a GOLDEN WEST EXPORT CO. PACA Docket No. RD-84-170. Decided March 26, 1984.

Respondent was ordered to pay complainant, as reparation, \$11,306.00, plus 13 percent interest per annum from August 1, 1983, until paid.

TENNECO WEST INC. *v.* A. LEVANTINO PRODUCE CORP. PACA Docket No. RD-84-232. Decided April 19, 1984.

Respondent was ordered to pay complainant, as reparation, \$21,452.78, plus 13 percent interest per annum from July 1, 1983, until paid.

TRANS WEST FRUIT CO. INC. *v.* WORLD PRIMARY PRODUCERS. PACA Docket No. RD-84-216. Decided April 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$14,729.80, plus 13 percent interest per annum from August 1, 1983, until paid.

TRU CORPORATION *v.* LAS VILLAS OF NEWARK INC. PACA Docket No. RD-84-176. Decided March 27, 1984.

Respondent was ordered to pay complainant, as reparation, \$2,775.00, plus 13 percent interest per annum from January 1, 1983, until paid.

VALLEY HARVEST DISTRIBUTING INC. *v.* GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-198. Decided April 5, 1984.

Respondent was ordered to pay complainant, as reparation, \$532.50, plus 13 percent interest per annum from September 1, 1983, until paid.

VAL-MEX FRUIT COMPANY, INC. *v.* LAS VILLAS PRODUCE COMPANY INC. PACA Docket No. RD-84-175. Decided March 27, 1984.

Respondent was ordered to pay complainant, as reparation, \$12,540.50, plus 13 percent interest per annum from September 1, 1983, until paid.

VAL-MEX FRUIT COMPANY, INC. *v.* R. A. CANALES d/b/a R. A. CANALES PRODUCE PACA Docket No. RD-84-214. Decided April 12, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,645.00, plus 13 percent interest per annum from September 1, 1983, until paid.

ZALEWSKI BROS. INC. *v.* FOUR SEASONS COUNTRY MKT. PACA Docket No. RD-84-238. Decided April 20, 1984.

Respondent was ordered to pay complainant, as reparation, \$1,000.00, plus 13 percent interest per annum from May 1, 1983, until paid.

MISCELLANEOUS REPARATION DEFAULT DECISIONS

FOUR STAR TOMATOE, INC. *v.* H. M. SHIELD INC. PACA Docket No. RD-84-120. Decided March 5, 1984.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is given 10 days from its receipt of this order in which to file its answer. Respondent's failure to submit a timely answer will result in the immediate issuance of a default order.

ONEONTA TRADING CORPORATION *v.* AZTEC TRADING CORPORATION.
PACA Docket No. RD-84-59. Decided March 12, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

against respondent in the amount of \$267,871.50 in connection with a transaction involving the shipment of apples and pears in interstate commerce.

A copy of the formal complaint was served on respondent. In a Motion to dismiss, respondent alleged that complainant had filed a complaint in the U.S. District Court for the Southern District of Florida involving the same subject matter as this proceeding. The Department, in a letter to complainant dated December 20, 1983, gave complainant 15 days from its receipt of such letter to show cause why its complaint should not be dismissed due to the U.S. District Court Action, pursuant to 7 U.S.C. 499e. Complainant failed to respond.

Accordingly, the complaint is hereby dismissed.

BIANCHI & SONS PACKING CO., v. SUNSE PRODUCE COMPANY, PACA
Docket No. RD-84-70. Decided March 12, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. Accordingly, on January 17, 1984, a Default Order was issued. This Order was stayed on February 8, 1984, after respondent requested that it be reopened after default to allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). Respondent's motion was served on complainant, which filed an opposition thereto.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

AG-WEST GROWERS v. NORMAN'S COUNTRY MARKET INC. PACA
Docket No. RD-84-87. Decided March 12, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and respondent is given 10 days from its receipt of this order to file its answer. A failure to file a timely answer will result in the reissuance of the default order.

JOE PHILLIPS & ASSOCIATES INC. v. SUPER DUPER FRUIT AND VEGETABLE Co., INC., a/t/a ASSOCIATED FOOD SERVICE. PACA Docket No. RD-84-101.

Decision by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$206,506.45 in connection with a transaction involving the shipment of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 26, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

SARATOGA DISTRIBUTORS *v.* BRICE BROTHERS INC. PACA Docket No.
RD-84-121. Decided March 12, 1984.

Decision by Donald A. Campbell, Judicial Officer.

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

SIGMA PRODUCE CO. INC. *v.* NOGALES TERMINAL DISTRIBUTORS INC.
PACA Docket No. RD-84-115. Decided April 11, 1984.

Decision by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$9,019.50 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent, which failed to file an answer. A Default Order was issued against respondent dated February 9, 1984. By telegram dated March 8, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the February 9, 1984, Default Order is vacated and the complaint is hereby dismissed.

STEVECO INC. v. MICHAEL BROS. INC. PACA Docket No. RD-84-125.
Decided April 17, 1984.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside.

Respondent is granted 10 days from service of this order within which to file an answer with the Hearing Clerk. Failure to file an answer will result in the vacating of this order, and reissuance of the Default Order. No extension of time will be granted.

STEVECO INC. v. KLEINMAN & MOCHBERG INC. PACA Docket No. RD-84-220. Decided April 30, 1984.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on April 13, 1984, awarding reparation to the complainant in the amount of \$5,694.66. By letter received April 9, 1984, respondent has moved that this matter be reopened after default.

Accordingly, the order of April 13, 1984 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant along with this order.

BIG RED TOMATO PACKERS *v.* ROBERT TRAVER. PACA Docket No.
RD-84-226. Decided April 30, 1984.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on April 16, 1984, awarding reparation to the complainant in the amount of \$3,985.65. A letter submitted by respondent, apparently intended as its answer, was received by the Department on April 3, 1984.

The order of April 16, 1984, is hereby stayed. Respondent is given ten (10) days from its receipt of this order to file a motion to reopen after default and show why a timely answer was not filed. If a motion to reopen is not timely filed, the Default Order will be reinstated.

In Re: CELIMENE MAXY. P.Q. Docket No. 1. Decided March 26, 1984.

Importing yams—Civil penalty—Consent.

Terry Medly, for complainant.

Lloyd Routman, for respondent.

Decision by William J. Weber, Presiding Officer.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Celimene Maxy, respondent, is an individual whose mailing address is 452 Northwest 82nd Street, Miami, Florida 33150.

2. On or about May 18, 1983, the respondent imported at least 15 pounds of yams, which had originated in Haiti, into Miami, Florida.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dollars (\$300.00) which shall be payable in six (6) fifty dollars (\$50.00) installments to the "Treasury of the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250. The first installment is to be received on March 10, 1984 and an installment is to be received each 30 days thereafter until the total civil penalty of \$300.00 is paid in full.

This order shall become effective on the day this order is served upon the respondent.

In Re: JOHNS MOBILE HOME SERVICE INC. P.Q. Docket No. 3. Decided April 26, 1984.

Movement of mobile home from gypsy moth high risk area, to non regulated area--Consent.

Terry Medley, for complainant.

William Cassidy, for respondent.

Decision by John G. Liebert, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a and 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.56 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allega-

tions in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) Any further procedure;
- (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Johns Mobile Home Service, Inc., respondent, is a corporation incorporated under the laws of the State of Pennsylvania and having its principle place of business at 2771 Lincoln Highway East, Ronks, Pennsylvania 17572.

2. On or about August 29, 1983, the respondent moved interstate from a gypsy moth high-risk area in Lancaster County, Pennsylvania, to a non-regulated area in Petersburg, Virginia, one mobile home.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable to the "Treasury of the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250 within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served on the respondent.

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